

U.S. Mines, Bureau of
Bulletin 159

Law Serial 12

DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, SECRETARY

BUREAU OF MINES

VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS

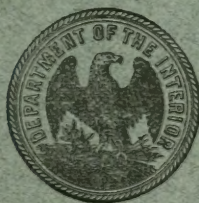
ON

MINES AND MINING

REPORTED FROM
MAY TO AUGUST, 1917

BY

J. W. THOMPSON



WASHINGTON
GOVERNMENT PRINTING OFFICE
1917

TN

23

64

no. 159

ENGINEERING

ENGINE STORAGE

111

DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, SECRETARY

BUREAU OF MINES

VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS

ON

MINES AND MINING

REPORTED FROM
MAY TO AUGUST, 1917

BY

J. W. THOMPSON



WASHINGTON
GOVERNMENT PRINTING OFFICE
1917

The Bureau of Mines, in carrying out one of the provisions of its organic act—to disseminate information concerning investigations made—prints a limited free edition of each of its publications.

When this edition is exhausted, copies may be obtained at cost price only through the Superintendent of Documents, Government Printing Office, Washington, D. C.

The Superintendent of Documents *is not an official of the Bureau of Mines*. His is an entirely separate office and he should be addressed:

SUPERINTENDENT OF DOCUMENTS,
Government Printing Office,
Washington, D. C.

The general law under which publications are distributed prohibits the giving of more than one copy of a publication to one person. The price of this publication is 15 cents.

First edition. December, 1917.

GENERAL SUBJECTS TREATED.

	Page.
Minerals and mineral lands.....	3
Eminent domain.....	10
Mining terms.....	13
Mining corporations.....	16
Mining claims.....	20
Statutes relating to mining operations.....	28
Mines and mining operations.....	47
Mining leases.....	77
Mining property.....	97
Quarry operations.....	107
Damages for injuries to miners.....	108
Water rights.....	109
Interstate commerce.....	110
Publications relating to mining laws.....	111



Digitized by the Internet Archive
in 2011 with funding from
University of Toronto

CONTENTS.

	Page.
Minerals and mineral lands	3
Minerals	3
Ownership of ore—Construction of contract.....	3
Purchase of gas—Refusal to deliver—Sale to others.....	3
Ownership of minerals in highway.....	4
Sale and conveyance	4
Sale and conveyance—Exception and reservation.....	4
Reservation construed as an exception.....	4
Surface and minerals—Ownership and severance	5
Grant of minerals—Right to surface support.....	5
Conveyance of minerals without surface support.....	5
Coal and coal lands	5
Conveyance of coal in place—Right to surface support.....	5
Injury to mine—Liability of surface owner.....	6
Oil and oil lands	6
Withdrawals—Bona fide occupants protected.....	6
Withdrawals—Rights of occupant—Diligent prosecution of discovery work.....	7
Ownership of oil.....	7
Operation of wells—Injunction refused.....	8
Sale of oil—Injunction.....	8
Sale of gas—Right to change rates.....	9
Eminent domain	10
Appropriation of land for mining purposes—Reasonable necessity.....	10
Theory of public use in mining industry.....	10
Mining property—Public use.....	10
Mining property—Particular public uses.....	11
Mining property—Appropriation for right of way.....	11
Mining property—Condemnation.....	12
Appropriation of coal for surface support.....	12
Mining terms	13
About.....	13
Bone.....	13
Casualties.....	13
Creep.....	13
Draw slate.....	13
First mining.....	14
Mine.....	14
On, in, or about.....	14
Pit-hole.....	14
Robbing a mine.....	14
Second mining.....	14
Snapper.....	15
Stump.....	15
Sumping.....	15
Sumping bar.....	15
Unavoidable casualties.....	15

	Page.
Mining corporations	16
Authority of officer.....	16
Officer's customary exercise of authority.....	16
Authority of president.....	16
Contract of president—Repudiation by corporation.....	16
Unauthorized contract of president—Specific performance.....	16
Liability for acts of president.....	17
Right to sue foreign corporation—Doing business.....	17
Corporation organized in one State to do business in another.....	17
Corporation tax—Doing business.....	17
Application of tax law.....	18
Income—Proceeds of ores mined.....	18
Foreign corporation—Doing business.....	18
Doing business—Service of process.....	18
Contract not usurious.....	18
Stock subscription—Failure of consideration—Liability.....	19
Mining claims	20
Nature and general features.....	20
Distinction between location and patent.....	20
Ownership of minerals.....	20
Vein or lode.....	20
Meaning as used in mining laws.....	20
Dip of vein—Presumption.....	20
Discovery.....	20
Condition to location.....	20
What constitutes a discovery.....	21
Sufficiency of discovery.....	21
Sufficiency—Willingness to operate.....	21
Surface lines.....	21
Requirement of statute—End and side lines.....	21
Extralateral rights.....	21
Common law rule changed by statute.....	21
Right to follow beyond end line or side line.....	22
Conditions—Parallelism of end lines.....	22
Identity of vein.....	22
Extent and limitations of rights.....	22
Patents.....	23
Construction and extent.....	23
Grant of surface beyond the boundaries.....	23
Trespass.....	23
Presumption—Burden of proof.....	23
Ownership of ore—Proof to overcome presumption.....	23
Ownership of ore—Proof of identity of vein.....	24
Placer claims.....	24
Meaning of term.....	24
Oil location.....	24
Discovery.....	24
Sufficiency and determination.....	24
Discovery—Oil seepage.....	24
Discovery—Sufficiency and test.....	25
Oil discovered in well—Sufficiency.....	25
Discovery—Willingness to operate.....	25
Discovery on separate claims.....	25

Mining claims—Continued.	Page.
Oil location—Continued.	
Discovery and annual assessment labor.....	25
Failure to make discovery—Withdrawal order.....	26
Work leading to discovery—Group claims.....	26
Group claims—Discovery and development work.....	26
Group claims—Assessment work.....	27
Statutes relating to mining operations.....	28
Construction, validity, and effect.....	28
Constitutionality of Arizona employer's liability act.....	28
Validity—Amount of recovery unlimited.....	28
Validity of Arizona employer's liability act—Police powers.....	28
Validity of regulations—Police powers.....	29
Duties imposed on operator.....	29
Presumption of negligence.....	29
Duty as to furnishing props—Compliance.....	30
Duty to furnish props without request.....	30
Rules and regulations—Notice.....	30
Duties imposed on miner.....	30
Inspection—Miner's working place.....	30
Duty of miner to make working place safe.....	31
Duty to use props.....	31
Duty to report defects—Application of statute.....	31
Violation by miner.....	31
Failure to prop roof.....	31
Failure to set props.....	32
Miner's working place.....	32
Failure of operator to support roof.....	32
Negligence of mine superintendent or foreman.....	32
Failure to inspect miner's working place.....	32
Foreman as agent or vice principal.....	33
Effect on contributory negligence.....	33
Burden of proof.....	33
Contributory negligence—Proximate cause.....	33
Failure to use props.....	34
Failure of miner to test roof.....	34
Apportionment of damages.....	34
Defense under employer's liability act.....	34
Effect on assumption of risk.....	35
Dangers inherent in occupation.....	35
Dangers not inherent in occupation.....	35
Violation of rules and regulations—Defense.....	35
Defense under workmen's compensation act of Arizona—Question of fact.....	36
Workmen's compensation act.....	36
Constitutional requirement—Mandatory.....	36
Constitutionality of Arizona workmen's compensation act.....	36
Constitutionality—Absence of negligence.....	37
Constitutionality—Liability without negligence.....	37
Construction, validity, and effect—Class legislation—Classification.....	38
Construction and nature.....	38
Purpose, and construction of act.....	38
Construction—Meaning of term "employee".....	39
Conditions creating liability.....	39

Statutes relating to mining operations—Continued.	Page.
Workmen's compensation act—Continued.	
Liability without proof of negligence.....	39
Application of employer's liability act—Negligence.....	40
Application—Nature of injury.....	40
Application to employer.....	40
Course of employment—Injury while off duty.....	40
Injury outside of State—Application of act.....	41
Shooting oil wells—Business covered by statute.....	41
Injuries arising out of employment.....	42
Injury occurring in or about a mine.....	42
Injury "on, in, or about" a mine.....	42
Accidental injury.....	43
Notice of injury—Purpose.....	43
Verbal notice of injury.....	43
Finding of Industrial Board—Conclusiveness.....	44
Amount of award—Partial dependency.....	44
Total dependency—Gratuitous assistance.....	44
Partial dependency—Separate income.....	44
Partial dependency—Dependent receiving all earnings.....	44
Injury aggravating disease—Compensation.....	45
Increased disability—Right to review.....	45
Review of claim—Presumptions.....	46
Drainage of mine.....	46
Liability for pollution of water.....	46
Mines and mining operations.....	47
Relation of master and servant.....	47
Proof—Ownership of property as evidence.....	47
Miner riding out of mine after work.....	47
Liability in absence of relation.....	47
Injury outside of employment.....	47
Negligence of operator.....	48
Proof of negligence—Admission of agent.....	48
Sufficiency of proof.....	48
Insufficient proof.....	48
Proof must show casual connection.....	49
Failure to inspect.....	49
Miner choosing unsafe method.....	50
Adopting unsafe way to do dangerous work.....	50
Method of removing pillars.....	50
Use of electric cables—Care required.....	51
Exercise of care—Injury to pedestrian.....	51
Servant's knowledge of danger.....	51
Leaving lumps of coal beside the track.....	52
Miners riding on cars—Liability for injury.....	52
Effect of workmen's compensation act.....	52
Liability of lessor for negligence of lessee.....	53
Duty of operator to furnish safe place.....	53
Duty to furnish safe place.....	53
Duty as to entries.....	53
Failure to furnish props.....	53
Promise to furnish props—Failure and liability.....	53
Unsafe tracks—Excessive speed.....	54
Proof limited to place designated.....	54

Mines and mining operations—Continued.

	Page.
Duty to provide safe appliances.....	54
Defective appliances—Proof and inferences.....	54
Safe place and appliances.....	54
Live electric wires.....	55
Defective coal-cutting machine—Question of fact.....	55
Acts of mule drawing coal car.....	55
Coal cars and tracks.....	55
Rule as to simple appliances.....	56
Operator's promise to repair.....	56
Dangers obvious—Right to rely on promise.....	56
Directions to continue work until repairs were made.....	57
Rules and regulations.....	57
Acquiescence of operator in violation of rules.....	57
Riding on coal cars prohibited.....	57
Negligence of foreman or officer.....	57
Negligence of foreman acting as superintendent.....	57
Rules regulating operations.....	58
Individual operations of president—Liability of corporation.....	58
Negligence of fellow servant.....	58
Negligence of motorman—Proof.....	58
Negligence of operator and motorman.....	59
Miner's working place—Safe place.....	59
Duty of miner to keep place safe.....	59
Scope of employment.....	59
Application to entry.....	59
Testing fuse.....	59
Duty of miner to observe dangerous conditions.....	60
Duty to warn or instruct.....	60
Failure to warn experienced miner.....	60
Contributory negligence of miner.....	60
Knowledge of danger that prevents recovery.....	60
Danger imminent—Question of law.....	61
Danger not obvious.....	61
Danger not obvious—Directions to proceed with work.....	61
Burden of proof.....	61
Superintendent's authority over inspector.....	61
Testing fuses near powder can—Injury from explosion.....	62
Negligence of car driver in driving mule.....	62
Freedom from contributory negligence—Miner working near electric wire.....	62
Shots fired by miner—Failure to inspect.....	63
Injury in entry—Failure to seek refuge hole.....	63
Method of operating cutting machine—Use of sumping bar.....	63
Violation of rules—Defense of contributory negligence.....	64
Riding on brake rod of moving motor.....	64
Employee choosing dangerous method of work.....	65
Law of foreign State.....	65
Assumption of risk.....	65
Risks assumed.....	65
Knowledge of danger.....	65
Dangers threatening immediate injury.....	66
Riding on moving motor—Danger obvious.....	66

Mines and mining operations—Continued.

Page.

Assumption of risk—Continued.

Risks assumed—Continued.

Miner enlarging entry..... 66

Ordinary acts of mule..... 67

Use of simple tools..... 67

Miner engaged in repair work..... 67

Risks not assumed..... 67

Extraordinary risks not assumed..... 67

Doctrine of nonassumption of extraordinary risks..... 67

Want of knowledge of danger..... 68

Defective runway..... 68

Law of foreign State..... 68

Proximate cause of injury..... 68

Defective appliances—Proximate cause..... 68

Instruction as to remote causes of injury not proper..... 69

Contracts relating to operations..... 69

Sale of mining machinery—Failure to deliver—Damages..... 69

Contract as to mining machinery—Ownership and possession..... 69

Contract to pump water—Termination..... 70

Operator as employer—Question of fact..... 70

Breach of contract to drill—Prospective profits..... 71

Methods of operating..... 71

Injury to mine—Right of lessee to recover..... 71

Adjacent owner mining coal under street—Regulation..... 72

Right to support..... 72

Severance of surface and minerals without right to support..... 72

Conveyance without right of surface support..... 73

Reservation of surface—Custom as to surface support..... 74

Sale of coal in place—Support not waived..... 74

Release of support must be express..... 74

Support not released by implication..... 74

Minerals reserved—Conveyance with right of support..... 74

Mining coal under street..... 75

Right to injunction to prevent removal of support..... 75

Injunction to prevent removal—Evidence insufficient..... 75

Nuisance..... 75

Mining coal under street—Method of mining..... 75

Wrongful death..... 76

Negligence of operator—Pleading and proof..... 76

Action under foreign statute..... 76

Proof of statute of foreign State..... 76

Mining leases..... 77

Leases generally—Construction..... 77

Construction—Nature of payments..... 77

Minimum royalty—Application..... 77

Liability of lessee for pumping water..... 77

Construction—Title conveyed..... 78

Coal leases..... 78

Minimum royalty—Application to unknown mines..... 78

Minimum royalty—Suspension of operations..... 78

Grounds for deduction from minimum royalty..... 79

Minimum royalty—Failure to mine or surrender lease..... 79

Minimum royalty—Inability to sell coal..... 79

Unavoidable casualties to reduce royalties..... 80

Mining leases—Continued.

Page

Coal leases—Continued.

Recovery of royalties—Deduction.....	81
Waiving liability for damages—Recovery of royalty.....	81
Burden of proof as to presence of coal—Termination of lease.....	81
Liability of lessor for negligence of lessee.....	82

Oil and gas leases.....	82
Construction—Interest relating to real estate.....	82
Construction—Knowledge and intention of parties.....	82
Practical construction—Adoption by court.....	82
Construction—Application of payments.....	83
Optional lease—Construction.....	83
Construction—Measurement of gas.....	83
Nature and effect—Right to prospect.....	84
Parol proof to aid construction.....	84
Joint lease—Rights of lessors.....	84
Joint lease of several tracts—Right of owners to re-lease.....	84
Performance by lessee—Vested right.....	85
Joint lease—Right of lessee.....	85
Rights of lessee—Vested rights.....	85
Possession by lessee—Presumption.....	86
Commencement to drill—What constitutes.....	86
Consideration—Development.....	86
Development—Duty to drill additional wells.....	86
Implied covenant to develop—Burden of proof.....	86
Implied covenant to develop—Damages for failure to drill—Proof.....	87
Failure to develop—Proof entitling lessor to damages.....	87
Failure to drill offset wells—Insufficient proof to sustain recovery.....	88
Construction—Development—Offset wells.....	89
Failure to develop—Recovery of damages—Parties.....	89
Failure to drill offset wells—Recovery against assignee—Proof of damages.....	89
Action against assignee for failure to develop.....	90
Rights of lessee as against subsequent lessee.....	90
Right of lessee to equitable relief.....	90
Assignee bound by contract to sell.....	91
Suit by assignee to enforce—Jurisdiction of Federal court.....	91
Failure to pay rent—Relief in equity.....	91
Measurement of gas—Basis for royalties.....	91
Termination of lease—Extension of time.....	92
Statutory provision for continuance.....	92
Cancellation.....	93
Agreement to cancel—Validity and effect.....	93
Failure to release of record.....	93
Abandonment—Liability for damages.....	93
Abandonment—Injunctive relief.....	94
Forfeiture clause—Availability.....	94
Rental and forfeiture.....	94
Surrender clause—Construction.....	95
Construction—Effect of surrender clause.....	95
Agreement to surrender—Right to surrender—Validity.....	95
Right to surrender—Presumption.....	95
Right of surrender—Lack of mutuality.....	96
Cash bonus—Surrender.....	96
Injunction to prevent violation of lease.....	96

	Page.
Mining properties	97
Taxation.....	97
Corporation excise tax law—Income.....	97
Basis for corporation excise tax.....	97
Gains derived from mining.....	98
Independent revenue from mining property.....	98
Property of independent value.....	98
Sale or conversion of capital not taxable.....	98
Allowance for depreciation on ores mined.....	98
Assessment increased—Relief—Statutory remedy.....	99
Power of tax commission to reduce assessment.....	99
Commission's refusal to reduce assessment.....	99
Valuation of iron mine—Sale price.....	99
Value of ore stipulated—Taxable income.....	100
Receipts from sale of lease—Not taxable income.....	100
Drain tunnel—Not subject to taxation.....	101
Trespass.....	101
Injury to mine—Liability of surface owners.....	101
Injunction to prevent trespass.....	101
Willful trespass—Punitive damages.....	102
Liens.....	102
Lien as creature of statute.....	102
Property subject to lien—Proof of reliance.....	102
Property covered by lien—Estoppel.....	103
Nature of work.....	103
Lien for labor—Nature of labor.....	103
Sufficiency of lien—Name of mine owner unknown.....	103
Sufficiency—Statement of owner of mine.....	103
Sufficiency—Contract relation.....	104
Sufficiency of record.....	104
Knowledge of ownership of property.....	104
Ownership of tools.....	104
Mine on public lands—Ownership.....	105
Operation of mine by joint owner—Liability of nonconsenting owner.....	105
Owner must give notice to avoid liability.....	105
Lien on leased mine—Failure to record lease.....	105
Priority between seller and landlord.....	106
Validity of Alaskan statute.....	106
Repeal of Alaskan lien law.....	106
Foreclosure—Rights of lien claimants not parties.....	106
Foreclosure—Amendment of pleading.....	106
Quarry operations	107
Defective appliances—Duty to warn.....	107
Failure to warn or instruct—Negligence.....	107
Expert evidence—Facts and conclusions.....	107
Damages for injuries to miners	108
Elements of damages.....	108
Permanent injury—Opinion of injured person.....	108
Damages not excessive.....	108
Instances.....	108
Water rights	109
Abandonment.....	109
Abandonment—Question of fact.....	109
Interstate Commerce	110
Sale of natural gas by receiver.....	110
Publications relating to mining laws	111

TABLE OF CASES DIGESTED.

A.

Adriatic Min. Co. v. District Court, etc., — Minn. —, 163 N. W. 755....43.
Advance Oil Co. v. Hunt, — Ind. App. —, 116 N. E. 340....86, 93, 96.
Ahlson v. High Bridge Coal Co., — Iowa —, 163 N. W. 219....20, 31, 48, 49, 59.
Andrews v. Andrews, — Pa. —, 100 Atl. 521....95.
Arnold v. Producers' Oil Co., — Tex. Civ. App. —, 196 S. W. 735....94.
Ash Grove Lime, etc., Co. v. Chanute Brick, etc., Co., — Kans. —, 164 Pac. 1087....86, 92, 93.

B.

Barker v. Condon, — Mont. —, 165 Pac. 909....20, 22, 23, 24.
Baumbach v. Sargent Land Co., 242 U. S. 503....17, 18, 78, 98, 99.
Bearman v. Dux Oil & Gas Co., — Okla. —, 166 Pac. 199....82, 83, 84, 94.
Beck v. Beck Coal & Min. Co., — Iowa —, 162 N. W. 861....15, 56, 57, 61, 64.
Bennett v. Howard, — Ky. —, 195 S. W. 117....13, 15, 79, 80, 81.
Big Muddy Coal & Iron Co. v. Industrial Board, — Ill. —, 116 N. E. 662....45.
Birdsall v. Delaware Hudson Co., 240 Fed. 618....78.
Bishop v. Henry, — Oreg. —, 165 Pac. 237....102, 103, 104, 105, 106.
Biwabik Min. Co. v. United States, 242 Fed. 9....97, 98, 100, 101.
Bloomington Bedford Stone Co. v. Phillips, — Ind. App. —, 116 N. E. 850....44, 45.
Bowland v. Anderson Coal Co., — Iowa —, 162 N. W. 321....79, 82.
Brevard v. Skidmore-Patterson Coal Co., — Kans. —, 165 Pac. 651....13, 14, 42, 43.

C.

Camp Carson Min., etc., Co. v. Stephenson, — Oreg. —, 165 Pac. 351....109.
Carter Coal Co. v. Reynolds, — Ky. —, 194 S. W. 311....13, 30, 32, 34.
Casparis Stone Co. v. Industrial Board, — Ill. —, 115 N. E. 822....36, 37, 38, 39, 45.
Central Coal & Coke Co. v. Ellison, — Mo. —, 195 S. W. 722....14, 50, 59, 76.
Church v. Central Coal & Coke Co., — Mo. App. —, 195 S. W. 573....30, 31, 49, 65, 68, 76.
City of Scranton v. Scranton Coal Co., — Pa. —, 100 Atl. 813....4, 14, 72, 73, 75, 76.
Cleveland-Cliff Iron Co. v. Republic Township, — Mich. —, 163 N. W. 90....100.
Commonwealth v. Clearview Coal Co., — Pa. —, 100 Atl. 820....5, 12.
Commonwealth v. Kington Coal Co., — Ky. —, 194 S. W. 1038....46.
Corona Coal & Iron Co. v. Amerson, — Ala. —, 75 So. 289....67, 70.
Cox v. United States Coal, etc., Co., — W. Va. —, 92 S. E. 559....13, 39, 48, 51, 52.

D.

Daly Judge Min. Co. v. Towey, 240 Fed. 658....48.
Dimmick v. Utah Fuel Co., — Utah —, 164 Pac. 872....61, 65, 68.
Downey v. Gooch, 240 Fed. 527....90, 95.

E.

Ely v. Wichita Nat. Gas Co., — Kans. —, 165 Pac. 284....3.

F.

Fennimore v. Pittsburgh-Scammon Coal Co., — Kans. —, 164 Pac. 265....44.
Fentress Coal & Coke Co. v. Elmore, 240 Fed. 328....54, 62, 69.
Foughty v. Ott, — W. Va. —, 92 S. E. 143....41.

G.

General Electric Co. v. Chattanooga Coal & Iron Corp., 241 Fed. 38....63.
Goodin, Brown & Co. v. Skaggs, — Ky. —, 195 S. W. 427....107.

H.

Henning v. Wichita Nat. Gas Co., — Kans. —, 164 Pac. 297....86, 93.
Higgins v. California Petroleum, etc., Co., 109 Cal. 304, 41 Pac. 1087....84.
Holmes v. Bloomfield Coal & Min. Co., — Iowa —, 162 N. W. 820....31, 32, 60.

I.

Inspiration Con. Copper Co. v. Mendez, — Ariz. —, 166 Pac. 278....28, 29, 35, 36, 37, 38, 39, 40, 64.

K.

Kendrick v. A. Y. & Minne Min. Co., — Colo. —, 164 Pac. 1161....99.

Kitchen v. Hillside Coal Co., — Ky. —, 194 So. 791....50, 51, 55, 63.

L.

Latshaw v. Stoddard, — Mo. App. —, 194 S. W. 727....70, 78.

Leyba v. Albuquerque Cerrillos Coal Co., — N. Mex. —, 164 Pac. 823....53, 65, 67, 68.

Lindsay v. Sonora Gold Min., etc., Co., — Mo. —, 196 S. W. 764....19.

Lynch v. Davis, — W. Va. —, 92 S. E. 427....82, 84, 85.

M.

Mandle v. Gharing, — Pa. —, 100 Atl. 535....4.

Marsh Min. Co. v. Inland Empire Min., etc., Co., — Idaho —, 165 Pac. 1128....10, 11, 12.

McCarrio v. Alaska Gastineau Min. Co., — Wash. —, 165 Pac. 73....17.

McCarrick v. Lenox Min. Co., — Utah —, 164 Pac. 478....16.

Moore v. Elk Horn Con. Coal, etc., Co., — Ky. —, 194 S. W. 340....54, 55, 62, 67.

Mound Coal Co. v. Jeffrey Mfg. Co., 240 Fed. 412....106.

N.

Nelson v. Republic Iron & Steel Co., 240 Fed. 285....77.

Noble v. West Penn. Nat. Gas Co., — Pa. —, 100 Atl. 480....84, 92.

O.

Ontario Silver Min. Co. v. Hixon, — Utah —, 164 Pac. 498....98, 101.

Otter Creek Coal Co. v. Archer, — Ind. App. —, 115 N. E. 952....31, 33, 40, 108.

P.

Penman v. Jones, — Pa. —, 100 Atl. 1043....5, 73, 74, 75.

Proctor Coal Co. v. Crabtree, — Ky. —, 194 S. W. 101....13, 14, 15, 50.

Q.

Quacker Oil & Gas Co. v. Jane Oil & Gas Co., — Okla. —, 164 Pac. 671....16, 17.

Quilp Gold Min. Co. v. Republic Mines Corp., — Wash. —, 165 Pac. 57....3, 21, 22.

R.

Rapson Coal Co. v. Micheli, — Colo. —, 164 Pac. 311....33, 59, 62.

Robinson v. Rispin, — Cal. App. —, 165 Pac. 979....71.

Rogers v. Reynolds, — Wash. —, 164 Pac. 60....102, 103, 104.

S.

Saylor Park Land Co. v. Glenwood Coal Co., — Iowa —, 162 N. W. 203....79, 81.

Seward Dredging Co., In re, 242 Fed. 225....70.

Shaffer v. Marks, 241 Fed. 139....8, 82, 84, 85, 91, 93, 94, 95, 96.

Simpson v. Carter Coal Co., — W. Va. —, 91 S. E. 1085....47, 52, 54, 56, 57, 58, 59.

Sims v. Southern Pipe Line Co., — Tex. Civ. App. —, 195 S. W. 283....9, 91.

Smith-Sohr Coal Min. Co. v. Industrial Board, — Ill. —, 116 N. E. 656....43, 46.

Sorg v. Frederick, — Pa. —, 100 Atl. 481....6, 14, 72, 101, 102.

Spaulding v. Martin, 241 Fed. 372....103, 105, 106.

State v. District Court, etc. — Minn. —, 163 N. W. 755....43.

State v. Ellison, — Mo. —, 195 S. W. 722....14, 50, 53, 59, 76.

State v. Landon, — Kans. —, 165 Pac. 1111....9, 110.

State v. Lord, — Minn. —, 162 N. W. 675....99.

Stearns Coal & Lumber Co. v. Spradling, — Ky. —, 195 S. W. 781....30, 53, 54, 60, 63, 67, 82.

Steele v. American Oil Dev. Co., — W. Va. —, 92 S. E. 410....86, 87, 88, 89, 90.

Strawn Coal Co. v. Trojan, — Tex. App. —, 195 S. W. 256....58, 63.

Stuart v. Camp Carson Min. etc. Co., — Ore. —, 165 Pac. 354....103, 104, 106.

Sudnik v. Susquehanna Coal Co., — Pa. —, 100 Atl. 318....53, 54, 61.

Superior & Pittsburgh Copper Co. v. Tomaich, — Ariz. —, 165 Pac. 1101....28, 29, 34, 35.

T.

Tauza v. Susquehanna Coal Co., — N. Y. —, 115 N. E. 915....18.

Titus v. United States Smelting, etc., Co., 240 Fed. 881....19.

Troy v. North Carolina Gold Min. Co. v. Snow Lumber Co., — N. C. —, 92 S. E. 494....17.

United States v. Dominion Oil Co., 241 Fed. 435 . . . 8, 26.

United States v. Ohio Oil Co., 249 Fed. 366 . . . 7, 20, 21, 24, 25, 27.

United States v. Stockton Midway Oil Co., 240 Fed. 1006 . . . 7, 25, 26, 27.

V.

Vilsock v. Youghiogheny & Ohio Coal Co., — Pa. — , 100 Atl. 539 . . . 15, 52, 55, 65, 66.

W.

Ward v. Liverpool Salt & Coal Co., — W. Va. — , 92 S. E. 92 . . . 17, 33, 47, 58, 61, 69, 108.

Wettengel v. Gormley, 160 Pa. 559, 28 Atl. 923, 40 Am. St. 733 . . . 84.

Whilden v. Maryland Gold Quartz Min. Co. — Cal. App. — , 163 Pac. 968 . . . 20, 22, 23.

Wiggins v. Standard Oil Co., 141 Ia. — , 75 So. 232 . . . 49, 52, 56, 67.

Williamson v. Wayland Oil & Gas Co., — W. Va. — , 32 S. E. 424 . . . 102.

ABSTRACTS OF CURRENT DECISIONS ON MINES AND MINING, MAY TO AUGUST, 1917.

By J. W. THOMPSON.

MINERALS AND MINERAL LANDS.

MINERALS.

OWNERSHIP OF ORE—CONSTRUCTION OF CONTRACT.

A contract between the Republic Mines Corporation and the Quilp Gold Mining Co. provided that upon forfeiture of its rights under a contract the Republic Mines Corporation was required to give a good and sufficient deed conveying to the Quilp Gold Mining Co. all ore bodies of every description lying east of the west line of the Quilp Mining Co. claim extended downward vertically and lying south of the north end line of the Quilp claim extended downward vertically and which may apex within the lines of the Surprise, an adjoining mining claim. It must be presumed that the contracting parties under such circumstances had in view their statutory rights as provided by the mining statutes of the United States, and that both were familiar with the provisions as to extra-lateral rights granted by the statute to locators of mining claims. This contract means to include all ore bodies of every description lying east (or easterly) of the west (or westerly) line of the Quilp claim extended downward vertically and south (or southerly) of the north end line of the Quilp claim extended downward vertically within the Quilp claim excepting the part that was overlapped by the Surprise claim, owned by the Republic Mines Corporation.

Quilp Gold Min. Co. v. Republic Mines Corp. (Washington), 165 Pacific 57, p. 61.

PURCHASE OF GAS—REFUSAL TO DELIVER—SALE TO OTHERS.

A gas company that had entered into a contract to purchase a quantity of natural gas refused to receive and accept the gas that was tendered on the ground that it did not conform to the requirements of the contract; subsequently the company refused to sign a writing by which it was asked to consent to the sale of such gas to other persons. But the refusal of the purchasing company to sign such a writing giving its consent or its refusal to consent to such sale did not affect the rights of the seller to dispose of the gas elsewhere and to other persons.

Ely v. Wichita Natural Gas Co. (Kansas), 165 Pacific 284.

OWNERSHIP OF MINERALS IN HIGHWAY.

All mineral deposits within the limits of a highway belong to the owner of the fee and he is entitled to remove them so long as he does not interfere with the public use of the highway.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 813, p. 819.

SALE AND CONVEYANCE.

SALE AND CONVEYANCE—EXCEPTION AND RESERVATION.

The owner of an undivided interest in oil and gas lands conveyed the same to certain named grantees by deed containing a clause excepting and reserving all the oil and gas produced from the undivided interest in the land described. The language is not apt for the creation of either an exception or a reservation, but is rather that of a layman unfamiliar with legal distinctions. Strictly and literally construed, it affords a basis for a contention that that which was excepted and reserved was not realty in any form or anything incident thereto, but personalty produced from the land. Immediately following the description of the tract, the grantor excepted and reserved something from the land described. What he excepted and reserved, he excepted and reserved then, and it was from his interest in the land. The clause expressed according to the evident intention of the grantor would read: "Excepting and reserving from the above all oil or gas which may hereafter be produced therefrom." No other construction can reasonably be placed upon the language used. The carving out of a separate estate in the oil and gas in land is a common occurrence in oil and gas producing fields.

Mandle v. Gharing (Pennsylvania), 100 Atlantic 535, p. 536.

RESERVATION CONSTRUED AS AN EXCEPTION.

Where apt words of reservation are used in a deed they will be construed as an exception where this is the evident intention of the parties to the instrument. Although an exception and a reservation differ in legal effect, yet in their creation there is no magic in words, and if the meaning is clear either expression will operate for the purpose designed. The technical distinction between an exception and a reservation is frequently disregarded in the ordinary use of the word, and whether the language used creates an exception or a reservation must be determined from the intention of the parties ascertained from the entire instrument.

Mandle v. Gharing (Pennsylvania), 100 Atlantic 535, p. 537.

SURFACE AND MINERALS OWNERSHIP AND SEVERANCE.**GRANT OF MINERALS—RIGHT TO SURFACE SUPPORT.**

The owner of the surface of land is entitled as against the owner of the underlying coal to absolute support of his land, not as an easement or right depending on a supposed grant, but as a proprietary right at common law.

Penman v. Jones (Pennsylvania), 100 Atlantic 1043, p. 1045.

CONVEYANCE OF MINERALS WITHOUT SURFACE SUPPORT.

A deed by the owner conveying mineral lands contained a reservation of the coal as follows: "All coal and minerals under said lots, however, are reserved to the grantor, with the right to mine and remove the same without incurring in any way liability for any damage to the surface of said lots, or to any buildings or improvements which may be or have been placed thereon." The land was underlaid with 11 separate veins of coal located at varying depths from the surface. Prior to the purchase of the lots for school purposes in 1896 certain portions of the coal had been leased to third parties and some mining had been done. After the conveyance a general lease of the coal was given that authorized and required the lessee to remove all available coal remaining in the tract. At great expense the lessee sunk a shaft and made preparations successfully and skillfully to carry on mining operations and proceeded to and did remove and was removing the coal without providing adequate surface supports. The mining of the coal under such circumstances was lawful and there was neither fraud nor concealment, and as the right to surface support was expressly waived, it was lawful for the lessee to remove all of the coal. The right to coal consists in the right to mine it, and an injunction or the judgment of a court preventing the mining would be, in effect, the taking of property of the lessee and giving it to the public or to the school authorities. Under such circumstances and such a conveyance the mining of coal without surface support can not be enjoined.

Commonwealth v. Clearview Coal Co. (Pennsylvania), 100 Atlantic 820.

COAL AND COAL LANDS.**CONVEYANCE OF COAL IN PLACE—RIGHT TO SURFACE SUPPORT.**

A conveyance of coal in place, together with the machinery, fixtures, tools, etc., and with the "hereditaments and appurtenances" belonging thereto, together with "all the established right, title, interest, benefit, property, claim and demand whatsoever" of the grantor, is referable to the subject-matter of the grant—that is, the coal conveyed—and does not amount to a waiver of the right of the grantor to insist upon support being left for the surface.

Penman v. Jones (Pennsylvania), 100 Atlantic 1043, p. 1045.

INJURY TO MINE—LIABILITY OF SURFACE OWNER.

A deed conveyed to the grantees all the coal and other minerals lying in and under the surface of the land conveyed without liability "for any damages done to the surface of said described tract of land in consequence of mining and working out said coal by the usual mode of mining and working the same." By the terms of the deed the grantees were to have the "perpetual right and privilege of passing through and under said described tract of land with other coal and minerals." The surface was subsequently conveyed to another, the deed "excepting and reserving therefrom and thereout all the coal underlying the same and the right to mine, take, and carry away all said coal, and also the right to use and occupy any and all entries under said tract of land and the right to enter upon said tract of land for the purpose of repairing any entry or entries that may become necessary, and the right to use said entries for the transportation of any coal that lies in that vein or strata." The deed expressly provides that it was without liability for surface support. During a long period of time while active coal mining was suspended the grantees, by the construction of drains and ditches, caused the surface water and vast quantities of débris to be washed into and partly fill the entries of the mine. Subsequently the coal was leased to the complainants, and thereafter the surface owners continued to drain the water and débris into the mine, filling up the entries, obstructing the entries, and damaging the mine. In an action by the lessees against the surface owners for damages they were only entitled to recover damages for injuries done to the mine after the execution of the lease, and the burden was on the lessees to show the injuries for which they claim damages arose subsequent to the time they took possession under their lease and to show what part of the damages claimed was due to the removal of accumulations after the date of the lease. The cost of the removal of débris accumulated since the complainants took possession under their lease was a sufficient basis for a determination by the jury of the damages, and these were questions of fact to be submitted to the jury and not questions of law to be determined by the court.

Sorg v. Frederick (Pennsylvania), 100 Atlantic 481, p. 482.

OIL AND OIL LANDS.

WITHDRAWALS—BONA FIDE OCCUPANTS PROTECTED.

The act of Congress of June 25, 1910 (36 Stat., 847), and as amended by the act of August 24, 1912, (37 Stat., 497) contains a proviso protecting bona fide occupants of oil lands who at the date of a withdrawal order are in diligent prosecution of work leading to the discovery of oil or gas. Under this proviso an occupant of an

oil claim without discovery is protected where prior to the date of a withdrawal order he had placed a caretaker in charge of the claim and had directed the shipment of certain material to the nearest railroad point and had ordered lumber to be delivered on the claim and had employed a carpenter to construct necessary buildings thereon and had entered into a contract with a driller to drill wells upon the claim. After the date of the withdrawal order the diligent prosecution and the subsequent completion of the work and the drilling of wells were confirmations of his prior good intentions and bona fides.

United States v. Ohio Oil Co., 240 Fed. 996, p. 1005.

WITHDRAWALS—RIGHTS OF OCCUPANT DILIGENT PROSECUTION OF DISCOVERY WORK.

The act of June 25, 1910 (36 Stat., §47), known as the Pickett Act, authorized withdrawals of the public lands and protected any occupants on the mineral lands who were in diligent prosecution of work leading to discovery of oil or gas. By this act Congress sought to give oil locators before discovery the same rights as against the Government that judicial decisions had given them against third persons. But there is no inference that Congress intended to confer any additional rights as against the Government upon those claiming without a discovery lands withdrawn by competent authority. Upon the withdrawal of land embraced in a mining claim in the absence of a discovery, a claimant possesses no rights as against the Government save the right, if he were then actually engaged in the diligent prosecution of such work leading to a discovery of oil or gas, to continue in the diligent prosecution of such work until a discovery be made, and not till then will his immunity against attack as by the Government be complete, but prior to such event and in the absence of the required diligent prosecution of work he had no defense to a withdrawal order.

United States v. Stockton Midway Oil Co., 240 Federal 1006, p. 1009.

OWNERSHIP OF OIL.

The owner of land is not by virtue of his proprietorship thereof the absolute owner of the oil and gas in and under the land in their free and natural state; but he, together with other owners of land in the gas field, has a qualified ownership consisting of the exclusive right to drill wells necessary to reduce such minerals to his possession, and by acquiring control thereof to become the owner of the oil and gas as his personal property with due regard in his operation to the like enjoyment of this exclusive right by other owners. This exclusive right is his private property, but by granting all the

oil and gas in and under his land he does not grant more than the right to reduce to ownership such oil and gas that may be obtained by operating on the land, whereby these substances that may be in and under the lands of other surface proprietors may come into the rightful ownership of the grantee as his personal property. A corporeal interest in oil and gas, due to their peculiar nature, can not be acquired without their reduction to personal property, but the exclusive and assignable right to do this, with the accompanying rights necessary to such accomplishment, constitutes a subsisting, exclusive, assignable, irrevocable right that accrues upon the execution of a written instrument of conveyance and before any action has been taken thereunder. Such a grant of right is in the nature of an incorporeal hereditament and is not a lease properly so called but is a conveyance of an interest in land within the meaning of the statutes.

Shaffer v. Marks, 241 Fed. 139, p. 142.

OPERATION OF WELLS—INJUNCTION REFUSED.

In a suit by the United States to recover oil lands on which there had been no discovery at the time of a withdrawal order, but where discovery was made and wells drilled after and in violation of the President's withdrawal proclamation, a court will take judicial notice of the fact that upon the sinking of a well into the oil sands and the production of oil therefrom a stoppage of the operations of the well will produce irreparable as well as incalculable injury to the property; and the court will not even in the face of waste being committed enjoin the operations of a well, as this would be to the damage of both parties and to the benefit of neither, and especially where the operating company is financially able to respond in damages and is willing to furnish a bond to pay any judgment recovered against it. Under such circumstances the court will not appoint a receiver pendente lite to operate and control the oil property upon which the wells have been sunk by the operating company. The Government in withdrawal cases possesses no higher or different right than private individuals seeking similar relief would possess.

United States v. Dominion Oil Co., 241 Fed. 425, p. 426.

SALE OF OIL—INJUNCTION.

An oil producer entered into an agreement with a pipe-line company to sell and deliver to it at a specified amount per barrel all of the oil produced and saved by the seller from a certain numbered well. The pipe-line company as such purchaser can not enjoin the seller from selling the oil from such well to another person, nor is it entitled to a mandatory injunction compelling the seller to deliver to

the pipe-line company all of the oil produced by the seller from such well, as a pipe-line company has an adequate legal remedy in an action for damages, and where such legal remedy exists, equitable relief will not be granted.

Simms v. Southern Pipe Line Co. (Texas Civil App.), 195 Southwestern 283, p. 287.

SALE OF GAS — RIGHT TO CHANGE RATES.

Under the statute of Kansas a receiver of a natural gas company has no right to change the rate or schedule of charges, rules, regulations, or practices pertaining to the supply of natural gas to the patrons of the company without the authority of the public utilities commission.

State v. Landon (Kansas), 165 Pacific 1111, p. 1112.

EMINENT DOMAIN.

APPROPRIATION OF LAND FOR MINING PURPOSES—REASONABLE NECESSITY.

The constitution (sec. 14, art. 1) and the statutes of the State of Arizona make mining a public use and authorize the appropriation of private land for such use. Under these statutes the power of eminent domain may be exercised and private property appropriated for mining purposes if a reasonable, although not an absolute, necessity exists for the taking of the property.

Marsh Mining Co. v. Inland Empire Mining etc. Co. (Idaho), 165 Pacific 1128.

THEORY OF PUBLIC USE IN MINING INDUSTRY.

The theory upon which eminent domain is extended in aid of the mining industry is that public benefit will result from the application of private property to public use. The end sought to be obtained is that mines be discovered, developed, and operated, and that thereby the wealth of the State and the prosperity of its people will be augmented. The welfare of the State of Arizona depends largely upon the development of its natural resources, and the discovery of minerals in paying quantities in undeveloped mines is of vital importance to the State and to its present and future inhabitants, as is the successful operation of mines already developed. But it was not the intention of the framers of the constitution, or the legislature, that the power of eminent domain be so invoked that one mine will be developed and another be thereby destroyed, or that one mine owner be enriched and another be impoverished. The aid of eminent domain is intended to be extended to the industry and not to the individual.

Marsh Mining Co. v. Inland Empire Mining etc. Co. (Idaho), 165 Pacific 1128, p. 1130.

MINING PROPERTY—PUBLIC USE.

The constitution of Arizona (sec. 14, art. 1) provides that the necessary use of lands for certain mining purposes is a public use and is subject to the regulation and control of the State; but where the land of a mining claim is held by the owner for mining purposes the constitution makes no provision for the taking of such property held for, or devoted to, a public use for the purpose of applying it to the same or any other use. Pursuant to the constitutional provision the statute of Arizona (secs. 5212, 5213, R. S. Codes) provides that prop-

erty appropriated to a public use shall not be taken unless for a more necessary public use than that to which it has already been appropriated; and before it can be taken it must appear that if already appropriated to some public use that the public use to which it is to be applied is a more necessary public use. The fact that one mining property is more fully developed and is yielding a larger production of ore, or that one mine is yielding ore in paying quantities while another is not, and the former is being operated upon a larger scale, does not justify or authorize the owner of the larger and the paying mine to appropriate the surface of the other mine for the more expeditious or profitable use of his mine.

Marsh Mining Co. v. Inland Empire Mining etc. Co. (Idaho), 165 Pacific 1128, p. 1129.

MINING PROPERTY—PARTICULAR PUBLIC USES

Under the constitution and statute of Arizona the right of eminent domain may be exercised in behalf of public uses, such as roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, as well as for outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse from mines; also an occupation in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

Marsh Mining Co. v. Inland Empire Mining etc. Co. (Idaho), 165 Pacific 1128, p. 1129.

MINING PROPERTY—APPROPRIATION FOR RIGHT OF WAY.

The statutes of Arizona (secs. 2223, 2224, Civil Code) make provisions whereby the owners of mines and mining claims less advantageously located than those of others can not be excluded from their property nor prevented from developing or operating them. Although the surface of a mine or a mining claim that is actively operated can not be appropriated by another mining company, yet the latter may, under these sections of the statutes, acquire a right of way for ingress and egress when necessary in working its mining claim over and across such other mining claim whether patented or not. The statute provides that when a mine or mining claim is so situated that for its convenient enjoyment a road, railroad, or tramway therefrom, or a ditch or canal to convey water thereto, or to drain or convey water or tailings therefrom, the owner thereof is entitled to a right of way, entry, and possession for all the uses and privileges for such railroad, tramway, ditch, canal, flume, cut, shaft, or tunnel in, upon, through, and across such other mining claim upon compliance with the provisions of the statute.

Marsh Mining Co. v. Inland Empire Mining etc. Co. (Idaho), 165 Pacific 1128, p. 1130.

MINING PROPERTY—CONDEMNATION.

The constitution (sec. 14, art. 1) and the statutes of Arizona make mining a public use and provide for the appropriation of property for mining purposes. It follows, therefore, that any property used for mining purposes is devoted to a public use, and mining property or the surface of a mining claim used for mining purposes in the operation of a mine is not subject to the power of eminent domain and can not be taken to be used for mining purposes or for the same purpose to which it is already devoted or for which it is in good faith being held, if by being so taken its present use and purpose will be defeated.

Marsh Mining Co. v. Inland Empire Mining etc. Co. (Idaho), 165 Pacific 1128, p. 1129.

APPROPRIATION OF COAL FOR SURFACE SUPPORT.

A school district in a city that purchased land with coal underlying and expressly waived the right of surface support can not, after taking possession and erecting its school buildings thereon, prevent by injunction the mining out of the coal, but the school district may, under its right of eminent domain, obtain by condemnation and payment therefor such or sufficient of the underlying coal as may be necessary to support properly the surface and its buildings.

Commonwealth v. Clearview Coal Co. (Pennsylvania), 100 Atlantic 820.

MINING TERMS.

ABOUT.

The word "about" used in the workmen's compensation act of Kansas means that at the time of the accident the workman must be employed "about" one of those specified localities and the locality of the accident must be within the purview of the act.

Brevard v. Skidmore-Patterson Coal Co. (Kansas), 165 Pacific 651.

BONE.

The word "bone" is a term applied to slate or rock found in coal after mining.

Cox v. United States Coal & Coke Co. (West Virginia), 92 Southeastern 559, p. 561.

CASUALTIES.

The word "casualties" in a coal-mining lease contemplating a suspension of operations is that which happens without design or without being foreseen.

Bennett v. Howard (Kentucky), 195 Southwestern 117, p. 118.

CREEP.

Where coal in a mine has been mined out and the pillars in the rooms removed the mountain over the rooms and entries has a tendency to "creep," due to the tremendous pressure above and to the fact that the support which held the mountain in place has been taken away. This tendency to creep is increased when the stumps are being removed unless removed in a proper way. Under the creeping process the normal condition of the roof is changed and the substances supporting it are crushed together so as to cause large pieces of shale and other substances to be crowded out of their natural places and fall to the ground of the mine.

Proctor Coal Co. v. Crabtree (Kentucky), 194 Southwestern 101, p. 102.

DRAW SLATE.

"Draw slate" is "slate" which is made loose and exposed by a blast blowing out the coal.

Carter Coal Co. v. Reynolds (Kentucky), 194 Southwestern 311, p. 313.

FIRST MINING.

First mining is the mining out of about 60 per cent of the coal and the balance is left in the form of pillars for surface support.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 813.

MINE.

As defined by the workmen's compensation act of Kansas, a mine means any opening in the earth for the purpose of extracting any mineral, and all underground workings, slopes, shafts, galleries, tunnels, and other ways connected therewith, including those in the course of being opened, sunk, or driven, and including all appurtenances, structures, etc., at or about the opening of the mine and any adjoining or adjacent working place where the material for the mine is prepared for use or shipment.

Brevard v. Skidmore-Patterson Coal Co. (Kansas), 165 Pacific 651.

ON, IN, OR ABOUT.

The workmen's compensation act of Kansas limits its provisions to employments "on, in, or about" mines and quarries and other named places. In order to bring a particular case within the purview of the act, the employment must be "on, in, or about" the named locality at the time of the accident. The act can not apply to persons employed at the stated places where such employment does not involve physical continuity to the named place within such limits as are reasonably necessary for the ordinary business carried on there.

Brevard v. Skidmore-Patterson Coal Co. (Kansas), 165 Pacific 651, p. 659.

PIT-HOLE.

A pit-hole is a break in the surface or a cave-in, making an opening from the surface through into the mine below.

Sorg v. Frederic (Pennsylvania), 100 Atlantic 481, p. 482.

ROBBING A MINE.

Robbing a mine is the work or process of removing pillars and stumps after the coal has been mined out and by reason of which the mine is wrecked.

Proctor Coal Co. v. Crabtree (Kentucky), 194 Southwestern 101.

State v. Ellison (Missouri), 195 Southwestern 722. (Central Coal & Coke Co. v. Ellison.)

SECOND MINING.

Second mining is the term applied to mining out and removing the pillars left in a mine for surface support.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 813.

SNAPPER.

A snapper is a brakeman employed on coal cars in hauling coal in and out of a coal mine whose duty it is to operate the brakes and couple and uncouple the cars.

Vilsock v. Youghiogheny & Ohio Coal Co. (Pennsylvania), 100 Atlantic 530, p. 532.

STUMP.

A stump is a large square pillar left to support the roof of a mine.

Proctor Coal Co. v. Crabtree (Kentucky), 194 Southwestern 101.

SUMPING.

Sumping is driving the cutter bar under the coal in cutting across the face of the coal in the operation of mining.

Beck v. Beck Coal & Mining Co. (Iowa), 162 Northwestern 861, p. 862.

SUMPING BAR.

A sumping bar used on an electric coal-cutting machine is about 8 feet long with flanges about 4 inches high and weighs about 75 pounds, and its function is to guide the cutter bar, and in its working position it is anchored to the jack pipes.

Beck v. Beck Coal & Mining Co. (Iowa), 162 Northwestern 861, p. 862.

UNAVOIDABLE CASUALTIES.

The term "unavoidable casualties," used in a mining lease providing for the reduction of a minimum royalty, is one which could not have been avoided by the exercise of reasonable diligence and skill.

Bennett v. Howard (Kentucky), 195 Southwestern 117, p. 118.

MINING CORPORATIONS.

AUTHORITY OF OFFICER.

Ordinarily the secretary of a mining corporation, as such, has no right to execute and deliver the promissory note of the corporation without authority from the board of directors.

McCarrick v. Lenox Mining Co. (Utah), 164 Pacific 478, p. 479.

OFFICER'S CUSTOMARY EXERCISE OF AUTHORITY.

Where it had been the custom of the secretary of a mining corporation to execute and deliver in behalf of the corporation promissory notes and instruments in writing and it was generally left for him to do without express direction of the board of directors, his authority to bind the corporation may be implied from the apparent power thus conferred upon him.

McCarrick v. Lenox Mining Co. (Utah), 164 Pacific 478, p. 479.

AUTHORITY OF PRESIDENT.

The president of a mining corporation has no power to buy, sell, or contract for his corporation or to control its property, funds, or management. The president can not act or contract for the corporation any more than any one director.

Quacker Oil & Gas Co. v. Jane Oil & Gas Co. (Oklahoma), 164 Pacific 671, p. 673.

CONTRACT OF PRESIDENT—REPUDIATION BY CORPORATION.

Where a contract made by the president of a mining corporation for the sale of its properties, approximately \$3,000,000 in value, was formally repudiated by the board of directors, the unauthorized act of the president can not bind the corporation in favor of a third person who was not a party to the contract.

Quacker Oil & Gas Co. v. Jane Oil & Gas Co. (Oklahoma), 164 Pacific 671, p. 673.

UNAUTHORIZED CONTRACT OF PRESIDENT—SPECIFIC PERFORMANCE.

A mining corporation can not enforce the specific performance of an unauthorized contract executed by the president of another mining corporation by which the president undertook to sell all the storage oil belonging to his corporation; nor to restrain by injunction the selling corporation from otherwise disposing of its oil,

where the corporation by its board of directors formally repudiated the unauthorized contract executed by its president.

Quacker Oil & Gas Co. v. Jane Oil & Gas Co. (Oklahoma), 164 Pacific 671, p. 674.

LIABILITY FOR ACTS OF PRESIDENT.

A mining corporation that turned over to its president the entire operation of a distinct part of its mining operations on his own behalf may be liable for the acts of the president in conducting this branch of the business, where neither the corporation nor the president took any steps to show that such branch of the business was the individual operations of the president and where the miners, by reason of the method of employment and of payment and the property used in conducting the mining operations, were led to believe that the operations were in fact those of the corporation.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southeastern 92, p. 96.

RIGHT TO SUE FOREIGN CORPORATION--DOING BUSINESS.

A mining corporation organized in New York and carrying on its mining operations in Alaska can not be sued in the State of Washington and jurisdiction acquired by the courts of that State by virtue of a summons served upon a local agent with an office in Seattle, where the duties of the agent in no wise related to the carrying on of the mining operations in Alaska, but consisted in some purchases and the forwarding of supplies to the company in Alaska.

McCario v. Alaska Gastineau Mining Co. (Washington), 165 Pacific 73, p. 75.

CORPORATION ORGANIZED IN ONE STATE TO DO BUSINESS IN ANOTHER.

A mining corporation was organized in the State of New York under the general statute of that State for the purpose of carrying on and conducting the business of gold mining on lands situated in the State of North Carolina. Such a corporation may sue in the courts of North Carolina where it has complied with the requirements of the latter State as to conditions precedent for doing business in that State and has been duly domesticated.

Troy & North Carolina Gold Mining Co. v. Snow Lumber Co. (North Carolina), 92 Southeastern 494, p. 495.

CORPORATION TAX--DOING BUSINESS.

A mining corporation that merely keeps up its organization for distributing rent received from a single lessee is not doing business within the meaning of the corporation tax act.

Baumbach v. Sargent Land Co., 242 U. S. 503, p. 516.

APPLICATION OF TAX LAW.

Section 38 of the act of August 5, 1909 (36 Stat., 11), known as the Corporation Tax Law, applies to mining corporations.

Baumbach v. Sargent Land Co., 242 U. S. 503, p. 517.

INCOME—PROCEEDS OF ORES MINED.

The proceeds from the sales of ores mined by a mining corporation from its own premises are income within the meaning of the act of August 5, 1909 (36 Stat., 11).

Baumbach v. Sargent Land Co., 242 U. S. 503, p. 517.

FOREIGN CORPORATION—DOING BUSINESS.

Corporations organized for the purpose of buying, owning, exploring, developing, leasing, improving, selling, and dealing in lands, and the doing of all things necessary or incidental to the things mentioned and for the further purpose of uniting in one ownership the undivided fractional interest of various stockholders for their convenience and to receive and distribute the proceeds thereof, and to receive and distribute among their shareholders the royalty from a number of outstanding, long-term mining leases and that employed another corporation to inspect the mining operations, to make mining exploration and to see that the lessees performed their contracts, are carrying on business within the meaning of the Corporation Tax Law.

Baumbach v. Sargent Land Co., 242 U. S. 503, p. 516.

DOING BUSINESS—SERVICE OF PROCESS.

A coal company of Pennsylvania maintains a branch office in New York in which it employs a sales agent and subordinate employees; but all sales made in New York are subject to confirmation by the home office in Pennsylvania and payments by customers are made to the treasurer in that State, as the local salesmen are without authority to receive or indorse checks and all shipments are made from the company's coal yards in Pennsylvania in response to orders transmitted from customers in New York. Such transactions constitute doing business within the State of New York in such a sense and in such a degree as to subject the coal company to the jurisdiction of the courts of New York by service of process on the sales agent.

Tauza v. Susquehanna Coal Co. (New York), 115 Northeastern 915, p. 916.

CONTRACT NOT USURIOUS.

A contract by a mining corporation, not engaged in loaning money, by which it consented to make explorations of certain mining property and to expend a sum not exceeding \$200,000 in such explora-

tions, and also agreed to discharge certain liens upon the property in consideration that it should receive a percentage of the stock in a company to be formed, is not subject to the charge of being usurious and therefore invalid although the par value of the stock to be issued was greatly in excess of the advances to be made.

Titus v. United States Smelting, Refining & Mining Co., 240 Federal 881.

STOCK SUBSCRIPTION—FAILURE OF CONSIDERATION—LIABILITY.

A stock subscription whereby the subscriber undertook in consideration of 50,000 shares of stock in a gold mining company to pay \$20,000 therefor can not be enforced where the evidence shows that of a capital stock of \$2,000,000 the promoters had issued to themselves \$1,500,000, without a dollar to the treasury and the other \$500,000 was placed upon the market, a part of which the subscriber agreed to take and pay for. The proof shows that the stock was without any value because of the utter absence of assets of the corporation issuing it and that the subscriber was misled by false statements to the effect that the corporation owned certain mines and that in fact the corporation did not and never did own any mine or any other property. Under such circumstances the administrator of the deceased subscriber had the right to defend an action on the subscription on the ground of the want of consideration.

Lindsay v. Sonora Gold Mining & Milling Co. (Missouri), 196 Southwestern 764, p. 765.

16543°—17—Bull. 159—3

MINING CLAIMS.

NATURE AND GENERAL FEATURES.

DISTINCTION BETWEEN LOCATION AND PATENT.

The location of a mining claim and a patent for a mining claim are not governed by the same rules. The mining statutes of 1872 expressly provide for the location of surface ground that must include the lode or claim as discovered; and a patent under this act can not grant any greater extent of surface ground than the location as made and marked by the surface boundaries.

Whilden v. Maryland Gold Quartz Mining Co. (California App.), 164 Pacific 908, p. 912.

OWNERSHIP OF MINERALS.

The owner of a mining claim is *prima facie* entitled to all ore beneath the surface of his claim.

Barker v. Condon (Montana), 165 Pacific 909, p. 912.

VEIN OR LODE.

MEANING AS USED IN MINING LAWS.

By the term "veins or lodes" as used in the mining statute is meant lines or aggregations of minerals embedded in quartz or other rock in place.

United States v. Ohio Oil Co., 240 Federal 996, p. 1000.

DIP OF VEIN—PRESUMPTION.

As a working hypothesis it may be assumed in the absence of a contrary showing that a vein or veins found within the vertical planes of the surface lines of a mining claim will continue to extend upward at the same angle as exhibited below.

Barker v. Condon (Montana), 165 Pacific 909, p. 912.

DISCOVERY.

CONDITION TO LOCATION.

A valid lode or placer mining claim can not be made until there is a discovery within the limits of the claims.

United States v. Ohio Oil Co., 240 Federal 996, p. 998.

WHAT CONSTITUTES A DISCOVERY.

Mere indications of minerals alone will not constitute a discovery within the meaning of this term as used in the mining statutes. Mere indications of mineral do not constitute the discovery of mineral itself. In lode claims it is the finding of the mineral in the rock in place that constitutes a discovery.

United States v. Ohio Oil Co., 240 Federal 996, p. 998.

SUFFICIENCY OF DISCOVERY.

When the locator of a lode claim finds rock in place containing minerals he has made a discovery within the meaning of the statute, whether the rock is rich or poor and whether it assays high or low.

United States v. Ohio Oil Co., 240 Federal 996, p. 998.

SUFFICIENCY—WILLINGNESS TO OPERATE.

In a lode location there must be a vein of mineral of such character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine; but mere willingness on the part of a locator unless evidenced by actual exploitation is a mere mental state that could not be satisfactorily proved. The discovery must be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.

United States v. Ohio Oil Co., 240 Federal 996, p. 1000.

SURFACE LINES.**REQUIREMENT OF STATUTE—END AND SIDE LINES.**

Under the United States mining statutes end lines of mining claims are required to be parallel, but the requirement does not apply to the side lines. By this statute the end lines of the mining location are required to be projected parallel with each other and crosswise of the general course of the vein within the surface limits of the location. The end lines are not necessarily those which are marked or so called, but they may be projected at the extreme point where the apex leaves the location as marked on the surface.

Quilp Gold Mining Co. v. Republic Mines Corp., Washington, 165 Pacific 57, p. 61.

EXTRALATERAL RIGHTS.**COMMON LAW RULE CHANGED BY STATUTE.**

Under the common law a mineral claimant would be entitled only to what might be over and under the surface of his mining claim, carved out by the extreme lines of location extended downward

indefinitely; but the mining statute qualifies or enlarges this right in one respect only to the extent that the locator may follow the lode or vein from the apex found within the surface ground of his claim, on its dip, to any depth, although in its course downward it may depart from the perpendicular and enter the land adjoining. This right to follow the vein beyond the side line does not apply on the course or strike of the vein.

Whilden v. Maryland Gold Quartz Mining Co. (California App.), 164 Pacific 908, p. 910.

RIGHT TO FOLLOW BEYOND END LINE OR SIDE LINE.

The owner of the lode mining claim can not follow the course of a vein beyond the end lines of his claim extended perpendicularly downward, but he may follow the dip to an indefinite distance in its downward course outside of his side lines.

Whilden v. Maryland Gold Quartz Mining Co. (California App.), 164 Pacific 908, p. 911.

CONDITIONS—PARALLELISM OF END LINES.

Where a mining location is duly made on the course or strike of a vein and the end lines cross the vein and are parallel, the locator is entitled to all veins apexing within the location with the right to follow any such vein on its dip if it passes outside of the vertical planes of a side line.

Quilp Gold Mining Co. v. Republic Mines Corp. (Washington), 165 Pacific 57, p. 61.

IDENTITY OF VEIN.

In order to give a mineral claimant the right to follow a vein on its dip extralaterally, identity throughout is essential.

Barker v. Condon (Montana), 165 Pacific 909, p. 912.

EXTENT AND LIMITATIONS OF RIGHTS.

The end lines of a location place a limit on the length of the vein beyond which a locator may not go; but the statute does not deny the right unless the vein in its course reaches from end line to end line. The statute nowhere says that the vein must either on or below the surface extend from end line to end line in order to have his extralateral rights. The locator is given the right to pursue any vein, whose apex is within his surface limits on its dip outside the vertical side lines. If a vein enters at an end line and terminates halfway across the length of the location, the locator's right to follow the vein on its dip beyond the vertical side lines is plainly given by the statute as though in its course it had extended to the farther end line.

Quilp Gold Mining Co. v. Republic Mines Corp. (Washington), 165 Pacific 57, p. 61.

PATENTS.**CONSTRUCTION AND EXTENT.**

A patent to a lode mining claim operates to convey not only the described tract of land patented by the locator, but also the lode contained therein with the right to follow the same in its downward course into adjoining premises, but not to follow it when on its onward course or strike it departs from the vertical side lines. In the latter case, after its departure, it is the subject of location by whomsoever it might be discovered.

Whilden v. Maryland Gold Quartz Mining Co. (California App.) 164 Pacific 908, p. 910.

GRANT OF SURFACE BEYOND THE BOUNDARIES.

A patent to a mining claim under the United States mining statutes granting to the applicant and patentee the mine, together with the right to follow the vein or lode with its dip, angles, and variations to any depth although it may enter into adjoining land, gives to the grantee the fee-simple title to the land within the surface boundaries as the claim was located, and so much of the vein or lode as apexed within the exterior surface boundaries of the claim with the right to follow such vein or lode on its dip beyond the vertical planes of the side lines; but the patent conveys no part of the lode or of the land on the surface beyond the exterior boundaries of the claim as located.

Whilden v. Maryland Gold Quartz Mining Co. (California App.) 164 Pacific 908, p. 911.

TRESPASS.**PRESUMPTION—BURDEN OF PROOF.**

Where a mineral claimant passes beyond the vertical plane of a side line of his claim and is found extracting and removing ore from beneath the surface of an adjoining mining claim, the presumption is against him, and prima facie he is a trespasser unless and until he makes it appear that he reached the point from which the ore was taken by following on its dip a vein or lode having its apex within the surface lines of his claim.

Barker v. Condon (Montana), 165 Pacific 909, p. 912.

OWNERSHIP OF ORE—PROOF TO OVERCOME PRESUMPTION.

Ore presumptively belongs to the owner of a mining claim because beneath the surface of his claim, and it can not rightfully be taken from him on the evidence of witnesses in favor of an adjoining surface claimant who entertained the opinion that the vein containing the ore had its apex in such adjacent claim, as the presumption

which attends the ownership of ore is not overturned by speculative conjecture or intelligent guess.

Barker v. Condon (Montana), 165 Pacific 909, p. 913.

OWNERSHIP OF ORE—PROOF OF IDENTITY OF VEIN.

The owner of a mining claim who sues the owner of an adjacent claim for the value of ore taken from a vein alleged to apex within his claim and where the ore taken was alleged and conceded to be under the surface of the defendant's claim must furnish substantial evidence as to the identity of the vein apexing within his claim with the vein found and from which the ore was taken under the surface of the defendant's claim. A failure to furnish satisfactory proof of the identity and continuity of the vein will bar the plaintiff's right to recover.

Barker v. Condon (Montana), 165 Pacific 909, p. 913.

PLACER CLAIMS.

MEANING OF TERM.

The term "placer claim" means ground within definite boundaries which contains minerals, ground that includes valuable deposits not in place.

United States v. Ohio Oil Co., 240 Federal 996, p. 1000.

OIL LOCATION.

DISCOVERY.

In an oil location it is the finding of petroleum in or upon the ground and so situated as to constitute a part of it that constitutes a discovery. But the oil or mineral need not be of commercial value.

United States v. Ohio Oil Co. 240 Federal 996, p. 998.

SUFFICIENCY AND DETERMINATION.

In determining the sufficiency of a discovery in an oil location it must be considered with reference to the special facts and conditions shown to exist in the particular mining district where the claim is located and in connection with the facts before the court.

United States v. Ohio Oil Co., 240 Federal 996, p. 998.

DISCOVERY—OIL SEEPAGE.

It can not be said that the discovery of seepage oil upon a mining location could not in any case constitute a discovery as required by the statute: and it would be erroneous to say that in every case where seepage oil is found upon a mining location it is sufficient to constitute a discovery.

United States v. Ohio Oil Co., 240 Federal 996, p. 998.

DISCOVERY—SUFFICIENCY AND TEST.

In making a discovery on an oil location it is not necessary to drill a well until the oil-bearing sands are reached; but it is sufficient if oil is discovered at any depth, if it is such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money with a reasonable prospect of finding oil in commercial quantities.

United States v. Ohio Oil Co., 240 Federal 996, p. 1003

OIL DISCOVERED IN WELL—SUFFICIENCY.

Oil found in one well drilled to a depth of 35 feet and in a well drilled to the depth of 57 feet on an adjoining location was held sufficient to constitute a discovery.

United States v. Ohio Oil Co., 240 Federal 996, p. 999.

DISCOVERY—WILLINGNESS TO OPERATE.

To constitute a discovery on an oil location it must be of such character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing oil in commercial quantities.

United States v. Ohio Oil Co., 240 Federal 996, p. 1000.

DISCOVERY ON SEPARATE CLAIMS.

The act of February 12, 1903 (32 Stat., 825), authorizes the assessment work for group oil claims to be performed upon any one of a group. But this does not take the place of discovery, and a discovery of oil on one quarter section or claim, no matter how persuasive as to the presence of oil in an adjoining quarter section or claim, will not validate a location of such other quarter or claim without a discovery within the limits of such claim.

United States v. Stockton Midway Oil Co., 240 Federal 1006, p. 1009.

DISCOVERY AND ANNUAL ASSESSMENT LABOR.

By the act of February 12, 1903 (32 Stat., 825), the annual assessment labor required by the statute may be performed upon one of a group of claims not exceeding five. By the act of June 25, 1910 (36 Stat., 847), known as the Pickett Act, and the amendment of August 24, 1912 (37 Stat., 497), a locator of an oil claim in possession and diligently prosecuting work leading to a discovery is protected as against a withdrawal order. But work done under the group development theory of the act of February 12, 1903, on one claim alone will not take the place of a discovery essential to the validity of the other claims of a group and thereby protect such remaining claims of the

group under the proviso of the Pickett Act, unless the occupant is diligently prosecuting the work leading to a discovery on each of the claims of the group. The group development and annual assessment labor under one act can not supply and take the place of the diligent prosecution of work leading to a discovery required under the other act.

United States v. Stockton Midway Oil Co., 240 Federal 1006, p. 1010.

FAILURE TO MAKE DISCOVERY—WITHDRAWAL ORDER.

The locator of an oil claim who had not made a discovery of oil prior to September 27, 1909, the date of the President's withdrawal proclamation, and upon lands withdrawn by such proclamation, but who subsequently discovered oil and drilled and operated producing wells may not be protected and may be liable at the suit of the Government for the value of the oil produced, but a court will not enjoin the operation of such wells because of the inevitable damages resulting from a suspension of operations and will not appoint a receiver where the parties are able to respond in damages and will give bond as required by the court.

United States v. Dominion Oil Co., 241 Federal 425, p. 426.

WORK LEADING TO DISCOVERY—GROUP CLAIMS.

The owner or occupant of a number of oil claims on which no discovery of oil has been made may hold the same under the proviso of the Pickett Act, if he is in possession and in the diligent prosecution of work on each of the claims leading to a discovery. But a contract with a well driller by which wells are to be drilled on the claims in succession and that contains a condition that if oil is not found on the claim first drilled upon then no drilling is to be done on the other claims, is not sufficient to hold the other such claims as against a withdrawal order.

United States v. Stockton Midway Oil Co., 240 Federal 1006, p. 1012.

GROUP CLAIMS—DISCOVERY AND DEVELOPMENT WORK.

The act of February 12, 1903 (32 Stat., 825), authorizes the annual assessment work and improvements to be made upon one of a group of oil claims not exceeding five, if the work tends to the development or to determine the mineral character of the other claims of the group. But diligent prosecution of work on one of a group of oil claims under this act will not protect the other claims of the group on which there has been no discovery as against a withdrawal order authorized by the Pickett Act.

United States v. Stockton Midway Oil Co., 240 Federal 1006, p. 1009.

GROUP CLAIMS—ASSESSMENT WORK.

By an act approved February 12, 1903 (32 Stat., 825), the locator or owner of a group of oil claims lying contiguous and not exceeding five, may perform the annual assessment labor upon any one of such claims if it tends to the development or to determine the oil-bearing character of such claims. Under this statute labor and improvements are deemed to have been had upon a mining claim when performed or made for its development, that is, to facilitate the extraction of the mineral the claim may contain, though such labor and improvements be at a distance from the claim. Such work and improvements may consist of the building of roads and such like work for the purpose of aiding in the development of the mining property.

United States v. Ohio Oil Co., 240 Federal 996, p. 1005.

United States v. Stockton Midway Oil Co., 240 Federal 1006, p. 1010.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY, AND EFFECT.

CONSTITUTIONALITY OF ARIZONA EMPLOYER'S LIABILITY ACT.

The employer's liability act of Arizona (Civil Code, 1913) is not invalid as in violation of article 18 of the State constitution. Section 7 of this article commands the legislature to enact an employer's liability act by which any employer shall be liable for the death or injury of employees in the hazardous occupations named whenever such death or injury is caused by any accident due to the conditions of the occupation, unless it has been caused by the negligence of the employee himself. If the injury or death was caused by the contributory negligence of the employee, the liability of the employer remains to the amount of the full damages less the amount of damages attributable to the employee's negligence, and in such case the damages are to be apportioned to employer and employee as the negligence attributable to the one is to the negligence attributable to the other. The statute in this case is in full harmony with the constitutional mandate and with its restrictions.

Superior & Pittsburgh Copper Co. v. Tomaich (Arizona), 165 Pacific 1101, p. 1103.

VALIDITY—AMOUNT OF RECOVERY UNLIMITED.

The workmen's compensation act of Arizona is not invalid because it fails to limit the amount that may be recovered by an injured employee. The constitution of Arizona (art. 2, sec. 31) expressly provides that no law shall be enacted limiting the amount of damages to be recovered for causing the death or injury of any person. A statute attempting to limit the amount recoverable for personal injuries would be in direct conflict with this plain provision of the constitution. However, a distinction must be made between statutes which provide a limited amount in satisfaction of damages and leave to the parties interested the right to elect to abide by their provisions, and must not be confused with statutes imperative in their terms.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 284.

VALIDITY OF ARIZONA EMPLOYER'S LIABILITY ACT—POLICE POWERS.

The employer's liability act of Arizona (Civil Code, 1913) is valid and within the police powers of the State and does not conflict with the fourteenth amendment of the Constitution of the United

States. Neither is it in conflict with section 5 of article 18 of the State constitution providing that the defense of contributory negligence or assumption of risk shall be questions of fact to be determined by a jury. This section of the State constitution does not restrict the power of the legislature to modify or abolish the defense of contributory negligence. The constitutional provision merely requires the submission to a court or jury of the question of contributory negligence in cases where such defenses are allowed.

Superior & Pittsburgh Copper Co. v. Tomaich (Arizona), 165 Pacific 1101, p. 1103.

VALIDITY OF REGULATIONS—POLICE POWERS.

The statute of Arizona (par. 3147, Civil Code, 1913) declares that employment in all underground mines, workings, open cut or open pit workings, or about or in connection with the operation of smelters, reduction works, stamp mills, concentrating mills, chlorination processes, cyanide processes, coke ovens and blast furnaces, is declared to be injurious to health and dangerous to life and limb. Thus the statute declares the occupations enumerated in this and other sections as inherently hazardous and dangerous to workmen engaged therein, and makes the obvious declaration that the risks and hazards incident to such occupations are unavoidable by the workmen engaged therein. The occupations designated as hazardous and dangerous and inherently unsafe are deemed for that purpose injurious to the health and dangerous to life and limb of the workmen engaged therein and fall within the police powers of the State for regulation and control. For the protection of workmen in such occupations the law casts upon the employer the duty to promulgate rules and regulations and instructions by which all such employees are informed as to their duties and restrictions of their employment. The safety of men engaged in the hazardous occupations named is the dominant idea running through the statute, and all laws which reasonably regulate such employments are regulations within the police powers of the state.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 282.

DUTIES IMPOSED ON OPERATOR.

PRESUMPTION OF NEGLIGENCE.

Under the statute of Iowa a coal-mine operator is presumed to be negligent where a laborer working in an entry entirely apart from his working place was injured by a fall of rock from the roof.

Ahlson v. High Bridge Coal Co. (Iowa), 163 Northwestern 219, p. 221.

DUTY AS TO FURNISHING PROPS--COMPLIANCE.

The statute of Kentucky (sec. 2726, subdiv. 5), makes it the duty of a mine operator to furnish the necessary props on the request of a miner. In the instant case a miner notified the mine foreman that he needed props of a designated length. At the time of this request there was in the mine and in the room where the miner was at work and before and at the time of the injury complained of a carload of timber that had been selected by fellow workmen under the direction of the miner for the purpose of being used as props. This timber was the same kind that the miner had theretofore used for props but which he believed on mere observation was too short, and that they were intended to be used as crossties for the mine track. The evidence sufficiently shows that the timbers supplied were of proper and suitable length and of the same kind that the miner had previously used and that had been selected by fellow miners at his request and were placed in a proper and convenient position for use. Under such circumstances the mine operator can not be charged with negligence in failing to furnish props and be held liable for an injury resulting to the miner who failed to use and failed to make any effort to use the props to prevent the roof from falling.

Carter Coal Co. v. Reynolds (Kentucky), 194 Southwestern 311, p. 312.

DUTY TO FURNISH PROPS WITHOUT REQUEST.

Under the statute of Kansas, it is the duty of a coal-mine operator to furnish sufficient props although not demanded by the miner.

Church v. Central Coal & Coke Co. (Missouri App.), 195 Southwestern 573, p. 574.

RULES AND REGULATIONS--NOTICE.

The statute of Kentucky (sec. 2738b), provides that the rules of a mining company shall not become effective until posted as provided in the statute. Under this rule a mining company can not in an action against it for damages for injuries resulting from the falling of an entry roof after blasting, show that it was the duty of the miner to examine the roof after a blast, where it was not shown that such rule had been posted as required by statute.

Stearns Coal & Lumber Co. v. Spradling (Kentucky), 195 Southwestern 781, p. 782.

DUTY IMPOSED ON MINER.

INSPECTION--MINER'S WORKING PLACE.

The statute of Iowa imposes upon a miner the duty of inspecting and timbering his working place. But this statute does not apply where an ordinary workman is sent to an entry to shovel up and load an accumulation of dirt. The entry was not his working place

even though he must pass through it in order to enter his room as he had no duty of inspection or of timbering in the entry. A miner is required to exercise reasonable care for his own safety at all times and places, but the specified duties enjoined upon him by the statute have no reference to an entry as the care of the entry including its timbering rests with the operator.

Ahlson v. High Bridge Coal Co. (Iowa). 163 Northwestern 219, p. 221.

DUTY OF MINER TO MAKE WORKING PLACE SAFE.

The statute of Iowa (Acts 34th Gen. Assembly, ch. 106, sec. 44), makes it the duty of each miner to examine his working place upon entering the same and not to commence to mine or load coal until the place is made safe. It also provides that each miner shall securely prop and timber the roof of his working place. This statute applies where a miner was employed and directed to reconstruct an entry or haulageway and where his work consisted of taking down the roof and sloping, filling up and leveling off the bottom. The statute has been held not to apply to a completed entry, but where a miner is employed to drive a new entry or to otherwise change an existing one by taking down the roof and making the entry higher, this must be regarded as his working place within the meaning of this statute.

Holmes v. Bloomfield Coal & Mining Co. (Iowa). 162 Northwestern 820, p. 823.

DUTY TO USE PROPS.

Under the statute of Kansas it is the duty of a miner to place the props for himself after they are furnished by the mine operator.

Church v. Central Coal & Coke Co. (Missouri App.). 195 Southwestern 573, p. 54.

DUTY TO REPORT DEFECTS—APPLICATION OF STATUTE.

Section 8580 (Burns, Indiana Stats., 1914) refers to those dangers peculiarly applicable to coal mines which are extra-hazardous working places and requires the miner in order to keep the mine as free from danger as possible to give notice of existing defects or dangers in his working place. But this section has no application to an action brought under the employer's liability act (Acts 1911, ch. 88) for damages for injuries caused by defects in the track on which the mine cars ran and by reason of which the employee received the injuries complained of.

Otter Creek Coal Co. v. Archer (Indiana App.). 115 Northeastern 952, p. 953.

VIOLATION BY MINER.

FAILURE TO PROP ROOF.

The statute of Iowa (Acts 34th Gen. Assembly, ch. 106, sec. 44) requires a mine operator to supply suitable timbers when required by a miner. It also requires a miner to examine his working place

and forbids him to commence work until it is made safe and requires him to securely prop and timber the roof of his working place. A mine operator can not be held liable for the death of an experienced miner who was employed to and was engaged in taking down the roof of an entry where shots had been fired for the purpose of loosening the roof and where the deceased miner after the shots were fired failed to sound the roof over the place where he was working though warned of the danger, and where it was his duty to take down the piece of slate that fell and caused his death, and where he had failed to timber closer than 15 to 20 feet of his working place and the rock that fell was about 10 feet of the place where he was working.

Holmes v. Bloomfield Coal & Mining Co. (Iowa), 162 Northwestern 820, p. 824.

FAILURE TO SET PROPS.

The statute of Kentucky (sec. 2726, subdiv. 5) makes it the duty of the mine operator to furnish the necessary props and the duty of the miner to set them. Accordingly, where a mine operator furnishes props on proper demand of a miner and as required by statute and the miner fails to set or place the props so as to sufficiently protect himself, a resulting injury can not be charged to the negligence of the operator.

Carter Coal Co. v. Reynolds (Kentucky), 194 Southwestern 311, p. 313.

MINER'S WORKING PLACE.

FAILURE OF OPERATOR TO SUPPORT ROOF.

The rule that an employer must furnish a safe working place for his employees does not apply to a coal-mine operator, where he employs experienced miners to drive an entry or haulage way from one vein of coal down to another and to reduce the grade of the slope so that the coal can be hauled out.

Holmes v. Bloomfield Coal & Mining Co. (Iowa), 162 Northwestern 820, p. 822.

NEGLIGENCE OF MINE SUPERINTENDENT OR FOREMAN.

FAILURE TO INSPECT MINER'S WORKING PLACE.

The failure of a mine foreman to visit the working place of a miner twice each week as required by the statute of Kentucky (sec. 2726, subdiv. 4), can not have the effect to establish negligence on behalf of the mine operator, where the place at the time of the falling of the slate producing the injury complained of had just been created and the conditions causing the fall of the slate had just been made by the miner himself, and the visits of the mine foreman, had they been made by him, could not in the least have served to prevent the particular piece of slate from falling and the foreman could not have rendered any service by a mere visit to the place, looking to the prevention of the falling of slate, which had not yet been exposed.

Carter Coal Co. v. Reynolds (Kentucky), 194 Southwestern 311, p. 313.

FOREMAN AS AGENT OR VICE PRINCIPAL.

A mine foreman, in addition to his statutory duties as prescribed by the statute of West Virginia, had, by authority of the mining company, general charge of the mining operations and employed and discharged miners. To the extent that he was required to perform services outside of his statutory duties he was the agent of the company and rendered it liable for his negligence in giving an improper order to a subordinate employee to throw a certain switch, thereby causing a train of empty coal cars, hauled into the mine and disconnected from the motor while still in motion, to be diverted from the main track or entry into a side entry, and that by reason thereof the train collided with and injured a miner who was ignorant of the danger and who, in obedience to previous directions of the mine foremen, was pushing a loaded car from his place of work onto the siding.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southeastern 92, p. 95.

EFFECT ON CONTRIBUTORY NEGLIGENCE.

BURDEN OF PROOF.

The statute of Colorado known as the fellow-servant act (R. S. 1908, sec. 2605), makes an employer liable for injuries to an employee, "being in the exercise of due care, from the employer's negligence or that of another servant." The phrase "being in the exercise of due care" was obviously inserted in the statute from motives of caution that it might not be stated that the declared liability of the master was intended to be absolute and without regard to any negligence of the injured person contributing to the injury; but under this statute the burden of proving contributory negligence rests upon the employer.

Rapson Coal Co. v. Micheli (Colorado), 164 Pacific 311, p. 313.

CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

To constitute contributory negligence there must be a want of ordinary care on the part of the employee and a proximate connection between that and the injury complained of, but the proximate cause of a result is not necessarily the sole cause, for there may be concurring causes all of which are proximate; and when one of the concurring causes of an injury is the negligence of the employee, it is then spoken of as contributory negligence. In an action by an injured miner for damages on the ground of the negligence of the mine operator he may recover on proof of the negligence of the operator proximately causing the injury, unless the evidence shows that the injured miner was himself guilty of negligence which concurred with that of the defendant in producing the injury.

Otter Creek Coal Co. v. Archer (Indiana App.), 115 Northeastern 952, p. 953.

FAILURE TO USE PROPS.

Where props of the required length and otherwise suitable for use are furnished by a mine operator either upon the request of a miner or without request and upon knowledge that they would be needed and deposited in a convenient and proper place for use by a miner, a failure on the miner's part to set the props and make the roof of his working place safe, resulting in an injury to him, caused by a fall of the roof, must be attributed to his own negligence in failing to set the props as required by the statute, and the mine operator can not be charged with negligence and made liable for an injury to the miner because he failed to supply the props.

Carter Coal Co. v. Reynolds (Kentucky), 194 Southwestern 311, p. 312.

FAILURE OF MINER TO TEST ROOF.

A miner whose duty it is to inspect and test the roof of his working place and where, after a blast, he examined the slate above where the coal was blasted and found some of it loose, which he took down but did not test the remaining part except by tapping it with his knuckle, but failed to test it with a pick or other solid substance, is guilty of such contributory negligence as will prevent a recovery for injuries caused by a fall of the slate of which he made such insufficient test.

Carter Coal Co. v. Reynolds (Kentucky), 194 Southwestern 311, p. 313.

APPORTIONMENT OF DAMAGES.

The constitution of Arizona (sec. 7, art. 18) commands the legislature to enact an employer's liability act making an employer liable for the death or injury of workmen employed in certain named hazardous occupations. It also provides that liability is incurred in all cases in which the injury or death of an employee shall not have been caused by the contributory negligence of the employee himself. The employer's liability act of 1913 (Arizona Civil Code, 1913) is not in violation of this constitutional provision because it permits or authorizes an apportionment of the damages where the employee himself was guilty of contributory negligence, but where the injury or death resulted from an accident arising out of and in the course of employment in a hazardous occupation and was due to conditions of the occupation or employment.

Superior & Pittsburgh Copper Co. v. Tomaich (Arizona), 165 Pacific 1101, p. 1103

DEFENSE UNDER EMPLOYER'S LIABILITY ACT.

In an action by a miner under the Arizona employer's liability act for damages for injuries received in the course of the hazardous employment, an answer by the defendant, the mine operator, to the effect that the injury resulted because of the contributory negligence

of the plaintiff in the manner in which he was performing his duties at the time of the accident, is insufficient because it fails to set forth any claim for a reduction of damages by reason of the alleged contributory negligence of the plaintiff. The civil code of Arizona (par. 3159), provides that contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to the employee, and therefore a plea of contributory negligence is not a defense to an action. The fact that the defendant admitted that its negligence in part was the cause of the damage by setting forth a charge of contributory negligence against the plaintiff, authorized a verdict against it in any event, the amount to be determined by the evidence.

Superior & Pittsburgh Copper Co. v. Tomaich (Arizona), 165 Pacific 1101, p. 1104.

EFFECT ON ASSUMPTION OF RISK.

DANGERS INHERENT IN OCCUPATION.

The workmen's compensation act of Arizona declares that all ordinary and extraordinary risks inherent in the occupation are unavoidable risks and dangers, and it necessarily follows that the employee in entering upon his duties does not assume such ordinary inherent risks, although known to him.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 283.

DANGERS NOT INHERENT IN OCCUPATION.

The workmen's compensation act of Arizona does not exclude as a matter of defense in an action by an injured employee the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks as the employee may assume must be risks and dangers other than risks and dangers inherent in the occupation.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 283.

VIOLATION OF RULES AND REGULATIONS—DEFENSE.

The workmen's compensation act of Arizona (par. 3157), provides that an employer may by rules, regulations, or instructions inform all employees in any dangerous occupation as to the duties and restrictions of their employment, for the purpose of protecting the safety of the employees; and if during the course of the employment any employee so informed does an act beyond his duty or in violation of the restrictions of his employment, dangerous in character, and suffers injury thereby, the employer may defend upon the ground of the assumption of the risk by the employee, but the defense must be specially pleaded and determined as an issue of fact. The statute restricts the employer's right in this defense, but does not abolish the right.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 284.

DEFENSE UNDER WORKMEN'S COMPENSATION ACT OF ARIZONA—
QUESTION OF FACT.

The workmen's compensation act of Arizona limits the common-law rule of assumption of ordinary risks to risks other than risks and hazards which are inherent in such occupations and which are unavoidable by the workmen and thereby contracts the scope of the employer's defense in such action; but the defense of assumption of risks other than ordinary risks and hazards and risks and hazards which are not inherent in such occupation still remains open to him and may be pleaded by him in defense as before, only the question must be determined by the jury as one of fact and not by the court as a question of law.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 284.

WORKMEN'S COMPENSATION ACT.

CONSTITUTIONAL REQUIREMENT—MANDATORY.

The constitution of Arizona (art. 18, sec. 7) requires the legislature to enact an employer's liability law by which the employer, whether an individual, association, or a corporation, engaged in all hazardous occupations, including mining and smelting, shall be liable for the death or injury of any employee, caused by any accident due to any condition or conditions of the occupation, if such death or injury shall not have been caused by the negligence of the employee himself. By this provision the framers of the constitution and the people in adopting it clearly made known to the legislative department that the public policy of the State is that employers of labor in hazardous occupations shall be liable in damages to an employee injured as provided, without regard to the question of negligence of the employer as the cause of the injury or death. The provision of the constitution is clearly mandatory, but the form of the State government furnishes no means by which the legislature may be coerced into obeying the constitutional mandate, and the courts themselves have no such power. The courts can only limit the legislative exercise of power in harmony with the constitutional provisions. This constitutional mandate in no manner controls the legislature in the adoption by it of any provisions of the employer's liability law, unless it attempts to place liability upon an employer for the death or injury of an employee killed or injured by his own negligence.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 281.

Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 823.

CONSTITUTIONALITY OF ARIZONA WORKMEN'S COMPENSATION ACT.

The Arizona workmen's compensation act is not unconstitutional as being in conflict with section 1 of the fourteenth amendment to the United States Constitution prohibiting laws which deprive any

person of property without due process of law and that deny persons the equal protection of the law, on the ground that the act in question makes an employer liable for personal injuries suffered by an employee in the absence of any fault or negligence on the employer's part in causing the injury.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 284.
Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 823.

CONSTITUTIONALITY—ABSENCE OF NEGLIGENCE.

The workmen's compensation act of Illinois (Hurd's Rev. Stats. 1915, 1916) is constitutional. It is within the power of the legislature to require an employer guilty of no negligence to pay an injured employee compensation.

Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 823.
Inspiration Consol. Copper Co. v. Mendez (Arizona), 166 Pacific 278.

CONSTITUTIONALITY—LIABILITY WITHOUT NEGLIGENCE.

Workmen's compensation acts and employer's liability laws are claimed to be invalid on the ground that the employer's property is taken without due process of law because he is subject to a liability for compensation without regard to any negligence or default on his part or on the part of his agent or employee. The validity of these laws are upheld on the theory that the whole common law doctrine of an employer's liability for negligence, with its defense of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fiction and is inapplicable to modern conditions of employment; and that in the present hazardous industries the causes of accidents are found so obscure and complex that it may be impossible to ascertain or prove the facts necessary on which to base an accurate judgment and the delay for such ascertainment may amount in effect to a defeat of justice; that under such system the injured workmen must bear the greater part of industrial accident losses and because of their limited income they and those dependent upon them are overtaken by poverty and frequently become a burden upon public or private charity. But liability without fault is not a novelty in the law. The common law liability of the carrier, of the innkeeper, or one who employs fire or other dangerous agents, or harbors mischievous animals, and many statutes imposing liability without fault have been sustained both in this country and in England. Laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 284.
Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 823.

CONSTRUCTION, VALIDITY, AND EFFECT —CLASS LEGISLATION—
CLASSIFICATION.

Under the doctrine of equal protection of the law the Federal Constitution prohibits class legislation; but there is no prohibition against a reasonable classification of persons and things for the purpose of legislation, but the classification must not be capricious or arbitrary, but must be reasonable and natural and based upon some principle of public policy. If the classification provided is not unreasonable and arbitrary and the statute is uniform in its operation on all the members of a class to which it is made applicable, the equal protection clause of the Federal Constitution is satisfied. In the exercise of its power to make classification the legislature is permitted wide range of discretion, and the question of classification is primarily with the law-making body and it becomes a judicial question only when the legislative action is clearly unreasonable. The classification provided in the Illinois workmen's compensation act (Hurd's Rev. Stats. 1915-16, ch. 48), bears a reasonable relation to the object sought to be accomplished and is uniform as to all members of the class to which it is made applicable; and it is not unconstitutional because of such classification.

Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 823.

CONSTRUCTION AND NATURE.

The workmen's compensation act of Arizona (Civil Code 1913, sec. 3147), and known also as the liability statute, must be construed as one creating a liability for accidents resulting in injury to workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability. Such statutes create a liability for accidents arising from the risks and hazards inherent in the occupation, without regard to the negligence or fault of the employer.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 281.

Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 823.

PURPOSE AND CONSTRUCTION OF ACT.

One of the primary purposes of the West Virginia workmen's compensation act was to provide pecuniary protection to employees and their dependent families in case of their personal injury received in the course of and resulting from their employment. It matters not whether the injury is a result of a mere accident or is occasioned by a negligent act of the employer that would render him liable at common law. The only essential condition entitling the injured employee to be compensated out of the fund is that the injury must occur in the

course of and result from his employment. Another purpose of the law was to relieve the employer from personal liability to the injured employee in cases wherein he would have been liable at common law on the ground of negligence in the performance of his duty to his employees.

Cox v. United States Coal & Coke Co. (West Virginia), 92 Southeastern 559, p. 561.

CONSTRUCTION—MEANING OF TERM "EMPLOYEE."

The term "employee" as used in section 22 of the West Virginia compensation act, means an employee who is injured in the course of and as a result of his employment, and one who under the common law principles of master and servant could have maintained an action against his employer. Where an employee is injured not in the course of his employment, his case stands as if the relation of employer and employee never at any time had existed between them.

Cox v. United States Coal & Coke Co. (West Virginia), 92 Southeastern 559, p. 561.

CONDITIONS CREATING LIABILITY.

The conditions of the Arizona workmen's compensation act or the employer's liability law which create liability to respond in damages are: That the person injured must be in the service of an employer carrying on a hazardous industry; that the industry to be dangerous and hazardous must be one which fairly comes within one or more of the industries enumerated in some section of the statute; that at the time an injury was suffered the employee must be engaged in the performance of some duty of his employment; that the accident causing the injury suffered arose from the dangerous and hazardous nature of the employment required in the industry as such is ordinarily carried on and in carrying on such service necessary risks and dangers inherent therein are present as menaces to the employee without knowledge of which and without incurring the dangers of injury therefrom he can not perform the required service.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 282.

LIABILITY WITHOUT PROOF OF NEGLIGENCE.

The workmen's compensation act of Arizona creates a liability on the part of an employer in certain-named occupations for damages suffered from any accident befalling his employees while engaged in the performance of duties in any such dangerous occupation without requiring proof of the negligence of the employer as an element of the right to recover.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 283.

Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 823.

APPLICATION OF EMPLOYER'S LIABILITY ACT—NEGLIGENCE.

In an action under the Indiana employer's liability act (Acts 1911, ch. 88), for damages for injuries to an employee in a mine, the provisions of section 8580 (Burns 1914) requiring the mine operator to inspect his mine and the miner to give notice of any defect discovered, have no application to the action and the provisions of that section can not apply where the defects complained of and relied upon as a basis of recovery do not come within that section of the statute.

Otter Creek Coal Co. v. Archer (Indiana App.), 115 Northeastern 952, p. 953.

APPLICATION—NATURE OF INJURY.

A miner while occupied in the performance of his underground duty and in the course of his employment in a copper mine opened a valve to admit compressed fresh air into a compartment of the mine for the purpose of clearing the working of foul air and permitting the workmen to proceed with the mining. On opening the valve the air escaping under heavy pressure struck the miner's face and cast dirt or other substances into his eyes causing the injuries complained of. In an action by the miner for damages no claim was made on the ground of the negligence of the mine operator, but a recovery was authorized and sustained on the ground that the injury was the result of the dangers and hazards arising in the course of the employment, within the Arizona workmen's compensation act.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 279.

APPLICATION TO EMPLOYER.

A coal-mining company that has elected to pay into the West Virginia workmen's compensation fund the premiums provided by the act, can not, in an action by an employee for damages for injuries sustained through its negligence, escape liability for the alleged negligence on the ground that it had elected to accept the provisions of the workmen's compensation act and was only liable according to its provisions, where the employee was not himself within the provisions of the act because not injured in the course of his employment.

Cox v. United States Coal & Coke Co. (West Virginia), 92 Southeastern 559, p. 561.

COURSE OF EMPLOYMENT—INJURY WHILE OFF DUTY.

A miner employed to work as a laborer in a mine was not prepared to commence work on the day shift at the hour the shift began work. Understanding that day laborers would not be admitted to the mine after the time for beginning work, he later started some

distance from the mine and the place where he boarded with other miners to make some purchases and on the way stopped to inform the mine foreman why he had not gone to work. On his return, while walking along a railroad track and as he reached a point opposite the tippie of the mine operator, he was struck on the head by a piece of "bone" thrown from a railroad car standing on the siding of the mine operator under his tippie. The piece of bone weighed 6 or 7 pounds, and was thrown a distance of 35 or 40 feet by an employee engaged in picking "bone" and "slate" out of the coal as it was being loaded. It was the custom of the mine operator to cast the slate and bone over the edge of the cars between the switch and the main line, letting it slide down the bank into the railroad ditch, and then shoveling it across the main line down a river bank. The employee engaged in picking out the slate and bone and who threw the piece that caused the injury did not see the employee that was struck. The injured employee was not injured in the course of his employment within the meaning of the West Virginia workmen's compensation act and has no right to demand compensation out of the workmen's compensation fund.

Cox v. United States Coal & Coke Co. (West Virginia) 92 Southeastern 559, p. 561.

INJURY OUTSIDE OF STATE—APPLICATION OF ACT.

An employee of an oil well drilling company, employed to shoot oil wells in the State of West Virginia, is protected by the provisions of the West Virginia workmen's compensation act (Laws 1913, ch. 10), though his injuries or death were sustained while performing some of his duties in the State of Kentucky.

Foughty v. Ott (West Virginia), 92 Southeastern 143, p. 144.

SHOOTING OIL WELLS—BUSINESS COVERED BY STATUTE.

The Southern Torpedo Co., a corporation in the State of West Virginia, was engaged in the business of manufacturing nitroglycerin and shooting oil and gas wells. Both branches of the business of the corporation are covered by the workmen's compensation act of West Virginia. The first is covered by classification t, and the second branch, "shooting oil and gas wells", is fairly covered by classification b of section 18 of the workmen's compensation act as amended by chapter 9, acts of 1915. On a showing that an application was properly made to cover both branches of its business, it may be assumed by the court that the company qualified and paid the premiums into the compensation fund as assessed by the commissioner.

Foughty v. Ott (West Virginia), 92 Southeastern 143, p. 144.

INJURIES ARISING OUT OF EMPLOYMENT.

Under the workmen's compensation act of Kansas a distinction is made between the term "out of the employment" and "in the course of the employment." An accident may occur in the course of employment and still have no causal connection with it so that it may be said the accident arose out of the employment. Under this act the accident must occur because of some peculiar danger incident to the particular employment and the statute limits its provisions to the dangers of the employer's business at designated places. Being run down by a car on an interurban railway track while a miner was passing on an errand from one mine to another some distance apart is not a special danger peculiar to the business of mining or to the conduct of a mine employee so passing from one mine to another. The same peril would confront a farm hand or any employee in employment not included in the statute.

Brevard v. Skidmore-Patterson Coal Co. (Kansas), 165 Pacific 658.

INJURY OCCURRING IN OR ABOUT A MINE.

A coal-mining company operated two open-pit coal mines about a quarter of a mile apart. Between the two mines and about 30 yards east of the west mine there is an interurban railway track. A miner was ordered by his foreman to take a coal drill from the east mine to the west mine and there procure a different tool. As the miner was in the act of crossing the interurban tracks he was struck by a car and sustained injuries from which he died. Under the circumstances it can be said that the accident did not occur "on, in, or about a mine" within the meaning of the workmen's compensation act, in the absence of an allegation in the petition of any joint system of operation extending over the two mines, or that of any nexus between them, or description of the mines which would indicate that mining operations and mining hazards overflowed either of the pits in the direction of the railway tracks.

Brevard v. Skidmore-Patterson Coal Co. (Kansas), 165 Pacific 659.

INJURY "ON, IN, OR ABOUT" A MINE.

The workmen's compensation act of Kansas provides that it shall apply only to employment "on, in, or about" a mine or quarry or a natural gas plant or other places mentioned. In determining the meaning of these words the act is held to be restrictive and that the employment shall be inherently dangerous to life and limb and none others were included. The hazards were the necessary and peculiar hazards attending railroading, factory work, mining, and the like. The act was extended not to the employment in the course of the employer's business generally or wherever conducted, but is limited

to the employer's business at designated places. The superficies of a mine are particularly described and the limitation to locality can not be ignored. Under this construction a miner passing on the surface from one mine to another about a quarter of a mile apart and who was struck and killed by an interurban car while crossing the tracks that lay between the two mines was not within the provisions of the workmen's compensation act as his death was not within the expression "on, in, or about" the mine.

Brevard v. Skidmore-Patterson Coal Co. (Kansas), 165 Pacific 659.

ACCIDENTAL INJURY.

Where a miner was, in the course of his employment, engaged in breaking up a chunk of iron ore with a hammer, a particle of the ore flew into his eye and was imbedded in the eyeball. A fellow workman, using a handkerchief wrapped around a match, removed the particle of ore from the eye and immediately washed the eye in water from the trough used daily by miners for washing their hands and faces. Shortly thereafter gonorrheal infection set in, causing total loss of the sight of the eye. This infection was introduced either at the time the particle of ore was removed or while the eye was being washed, as the workman himself was free from such infection. The injury thus received was accidental within the meaning of the Minnesota workmen's compensation act and the injured miner entitled to compensation.

State (Adriatic Mining Co.) v. District Court, etc. (Minnesota), 163 Northwestern 755.

NOTICE OF INJURY—PURPOSE.

Section 24 of the Illinois workmen's compensation act (Hurd's Rev. Stats. 1915-16, ch. 48) requires that notice of an accident be given the employer as soon as practical but not later than 30 days after the accident and the notice shall apprise the employer fully of the circumstances and injury. The purpose of this was to prevent employers from being held liable for fraudulent injuries without an opportunity of investigating before such a lapse of time that the fraud could not be discovered.

Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 824.

VERBAL NOTICE OF INJURY.

Under the Illinois workmen's compensation act (Hurd's Rev. Stats., ch. 48) a verbal notice of the injury to the employer is sufficient.

Smith-Sohr Coal Mining Co. v. Industrial Board (Illinois), 116 Northeastern 656.

FINDING OF INDUSTRIAL BOARD—CONCLUSIVENESS.

Questions of fact determined by the industrial board under the Indiana workmen's compensation act are conclusive on the court on appeal where there is any evidence to support the findings of the board.

Bloomington Bedford Stone Co. v. Phillips (Indiana App.), 116 Northeastern 850, p. 851.

AMOUNT OF AWARD—PARTIAL DEPENDENCY.

An award made by the Indiana industrial board to a widowed mother partly dependent on her minor son, who was killed, would be the same if the board intended to find that the mother was totally dependent or if the board intended to find that the mother was partly dependent where it found as a fact that the deceased boy turned all his wages over to his mother, as the result in both cases is the same.

Bloomington Bedford Stone Co. v. Phillips (Indiana App.), 116 Northeastern 850, p. 852.

TOTAL DEPENDENCY—GRATUITOUS ASSISTANCE.

Total dependence under the Indiana workmen's compensation act (Acts 1915, ch. 106) exists where the dependent subsists entirely on the earnings of the injured employee. In applying this rule courts have not deprived claimants of the right of total dependency, if otherwise entitled thereto, on account of temporary, gratuitous services rendered them by others or on account of occasional financial assistance from other sources, or on account of other minor circumstances which do not substantially change the general rule.

Bloomington Bedford Stone Co. v. Phillips (Indiana App.), 116 Northeastern 850, p. 852.

PARTIAL DEPENDENCY—SEPARATE INCOME.

In an action by the father and mother of a deceased miner for compensation for his death under the Kansas workmen's compensation act (Gen. Stats. 1915, secs. 5903-5905), it is sufficient to prove that the parents did in fact depend in part on their son's earnings so that they suffered injury by being deprived of what they had relied on; and this is sufficient on which to base a judgment of partial dependency although the father owned a home and had a considerable income and was employed at a salary of \$125 a month.

Fennimore v. Pittsburgh-Scammon Coal Co. (Kansas), 164 Pacific 265, p. 266.

PARTIAL DEPENDENCY—DEPENDENT RECEIVING ALL EARNINGS.

A widowed mother who supports herself and her minor children from a common fund made up of her own earnings and income and the earnings of the minor son who was killed, was partly dependent

on him for support under the Indiana workmen's compensation act, and if the mother received all the earnings of the deceased son, she is entitled to the same compensation as a total dependent would be.

Bloomington Bedford Stone Co. v. Phillips (Indiana App.), 116 Northeastern 850, p. 852.

INJURY AGGRAVATING DISEASE—COMPENSATION.

The Illinois workmen's compensation act (Hurd's Rev. Stats. 1913, ch. 48), provides among other things that where an injury has been sustained the employee as a result thereof becomes partly incapacitated from pursuing his usual employment he shall be entitled to compensation at the specified rate. The previous physical condition of the employee is unimportant so long as the injury sustained is the proximate cause of the incapacity for which compensation is sought. The protection afforded is not confined to healthy employees. It is the injury arising out of the employment and not out of the disease of the employee for which compensation is made. It is the hazards of the employment acting upon the particular employee, not his condition of health, and not what the hazards would be in acting upon a healthy employee. An employee may be suffering from some ailment and the exertion of the employment or the injury may develop his condition in such a manner that it becomes a personal injury and he is entitled to recover for all the consequences attributable to the injury. The augmenting or aggravating of a preexisting ailment may therefore be a personal injury within the workmen's compensation act.

Big Muddy Coal & Iron Co. v. Industrial Board, etc., Illinois, 116 Northeastern 662.

INCREASED DISABILITY—RIGHT TO REVIEW.

It was not the intention of the Illinois workmen's compensation act (Hurd's Rev. Stats. 1915-16, ch. 48), to defeat a recovery because of any inaccuracy or technical defect in the form of the notice where a disability for which the employee has received compensation has recurred or increased. The employee may without previous notice, but within 18 months from the time of the agreement or award, petition for a review under the original section 19h (sec. 144). On such review the petitioner must produce in evidence the record of the former hearing as this is essential to the review and it is error to receive evidence as if the hearing were an original one. On such review or rehearing, the injured employee can only be permitted to show the changes in his condition since the former hearing.

Casparis Stone Co. v. Industrial Board, etc. (Illinois), 115 Northeastern 822, p. 824.

REVIEW OF CLAIM—PRESUMPTIONS.

By the failure to file a statement of the facts as shown by the additional testimony on the review of a claim, or a stenographic report of the same, a material step in the proceedings to review the decision of the Illinois industrial board was admitted, but under such circumstances it must be presumed that the additional evidence heard was sufficient to sustain the board's findings in the absence of such additional testimony from the record. So in the absence of a report of such additional testimony the finding of the board that sufficient notice had been given is conclusive and it must be assumed that the additional evidence offered supported the finding of the board on the question of temporary and total disability.

Smith, Sohr Coal Min. Co. v. Industrial Board (Illinois), 116 Northeastern 656, p. 658.

DRAINAGE OF MINE.

LIABILITY FOR POLLUTION OF WATER.

The statute of Kentucky (sec. 2729, subdiv. 3), requires that a mine foreman shall see that the water is drained out of the working places before the miners enter and that the working places are kept as free from water as practicable during working hours; and requires the owners, lessees, or operators of mines to see that the water drained from mines shall be drained as directly as practicable to the adjacent streams or watercourses by means of ditches, flumes, pipes, sewers, or other adequate provisions. This statute was primarily passed in the interest of the health and well-being of persons employed in coal mines. It is a well-known fact that in all coal mines and especially those under drainage great quantities of water accumulate which must be removed in order that miners may have a reasonably healthy place in which to work. To remove the water from mines it is necessary to carry it to the surface and as nearly all water from coal mines carries copperas, sulphur, and the like which is more or less destructive to plant life and deleterious to the soil it was deemed wise by the legislature to require mine owners to conduct the water into running streams. The legislature having passed the act requiring the drainage of water from coal mines into adjacent streams, the State can not prosecute a mining company for so draining the water from its mine into the stream, although it may in effect as to some individual persons create a nuisance.

Commonwealth v. Kington Coal Co. (Kentucky), 194 Southwestern 1038.

MINES AND MINING OPERATIONS.

RELATION OF MASTER AND SERVANT.

PROOF—OWNERSHIP OF PROPERTY AS EVIDENCE.

In an action by a miner for damages for injuries received while working in a mine due to the alleged negligence of the mine operator, where the coal-mine company denies it was operating the mine at the time of the injury, evidence is admissible to show that the personal property used in operating the mine was listed for assessment and taxation in the name of the mining corporation for the year within which the miner was injured and for some years previous and subsequent thereto, and that the listing of the property was made by officials and agents with authority to make returns of its property to the assessor.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southeastern 92, p. 96.

MINER RIDING OUT OF MINE AFTER WORK.

The relation of master and servant exists between a coal-mine operator and a miner or employee after the miner has finished his day's work and is riding out of the mine on a trip of cars with the knowledge and consent or acquiescence of the mine operator. The duty of the mine operator to the miner while so riding on a trip is equal to his duty to his motorman so far as it relates to the safe condition of the cars and tracks and if any violation of this duty results in an injury to the miner, the mine operator will be liable in damages.

Simpson v. Carter Coal Co. (West Virginia), 91 Southeastern 1085, p. 1086.

LIABILITY IN ABSENCE OF RELATION.

The rule requiring the existence of the relation of master and servant in order to make the master liable to the servant for an injury sustained, due to the negligence of the alleged master, is not without its exceptions. There are circumstances and conditions under which a person not actually the master or employer may be held liable as if he were in fact the employer.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southeastern 92, p. 94.

INJURY OUTSIDE OF EMPLOYMENT.

The West Virginia workmen's compensation act has no application either to the employer or the employee where the latter is injured while not engaged in his employment. Where an employee is injured while

not engaged in the employment, by reason of the alleged negligence of the employer his right to recover damages exists under common-law rules as if his relation of employer and employee never at any time existed.

Cox v. United States Coal & Coke Co. (West Virginia), 92 Southeastern 559, p. 5.

NEGLIGENCE OF OPERATOR.

PROOF OF NEGLIGENCE—ADMISSION OF AGENT.

In an action by a laborer in a mine for damages for injuries caused by a fall or rock from the roof of an entry, it is proper on the question of negligence to prove instructions given by the mine foreman where they were given in advance of the accident and pertain to the duties imposed by law upon the operator and imposed by the operator upon the foreman and through him upon the timbermen and where the instructions had a clear tendency to show negligence in that the foreman and timbermen knowingly took the chance of a falling roof which they could have readily avoided by the use of temporary timbers.

Ahlson v. High Bridge Coal Co. (Iowa), 163 Northwestern 219, p. 220.

SUFFICIENCY OF PROOF.

In an action for damages for injuries to a motorman, it was alleged that the injuries were caused by a loose plank in the track being thrust up through the bottom of the motor due to the alleged negligence of the mine operator in permitting the plank in the track to become and remain loose, and in so maintaining the motor that the lower part thereof was open, through which extraneous objects might pass and cause injury to the motorman. Proof that there was a loose plank in the track at the place where the accident occurred, and that the plank had been loose for 10 days or more prior to the accident is sufficient to sustain a verdict and special findings by the jury to the effect that they did not know how the plank became loose or how long it had been loose are not inconsistent with the general verdict or insufficient to sustain it. It was the continuous duty of the mine operator to exercise ordinary care to keep the planks and the track in a reasonably safe condition so as not to cause an accident to the motor resulting in an injury to the motorman.

Daly Judge Mining Co. v. Towey, 240 Fed. 658, p. 660.

INSUFFICIENT PROOF.

A helper in a drilling crew composed of four persons was injured while engaged in knocking down pipe. The work consisted in unscrewing and separating into its original lengths the pipe taken from an oil well. The pipe in the process of the work was lowered into a

hole so that the men could reach and unscrew the joints. The injured helper was using a 12-pound sledge hammer, striking the sleeve or collar in order to loosen the threads. While so engaged his foot slipped off the muddy plank on which he was standing and he fell into the machinery, breaking, mangling, and crushing his leg so as to require amputation. The proof was insufficient to show negligence on the part of the employer because of the use of the 12-pound hammer that increased the danger of slipping on the wet plank of the derrick floor. So the proof of negligence was insufficient on the ground that the plank on which the helper was instructed to stand was wet, muddy, and slippery and the hole in the derrick floor was left unguarded, where it appears that the injured helper was a workman of two years' experience and was as capable of observing and guarding against the dangers of the employment as any man of superior authority and where there was no hidden danger in the employment or need of special instructions as to the safe and proper manner of doing the work.

Wiggins v. Standard Oil Co., 141 Louisiana —, 75 Southern 232, p. 233.

PROOF MUST SHOW CAUSAL CONNECTION.

In an action for damages by a miner for injuries sustained in the course of the employment, the proof must sufficiently show that the operator's negligence was the cause of the injury and the causal connection between the negligence and the injury must be established.

Church v. Central Coal & Coke Co. (Missouri App.), 195 Southwestern 573, p. 574.

FAILURE TO INSPECT.

The timbers in an entry 8 feet wide had been blown out by some shots fired in the course of mining operations, and the roof of the entry was permitted to remain unsupported for a period of four days to a week. Lime seams in the roof of an entry disintegrate more rapidly than in rooms because of the circulation of the air currents through the entry. A sure evidence of a settling roof is a cut at the angle between the roof and rib, and in the entry in controversy and where the injury complained of happened this cutting was manifested a day or two prior to the accident. This was observed by timbermen in their inspection, but their warning as to the condition was ignored. Under these circumstances the question as to the liability of the coal company for injuries to a common laborer while working in the entry, caused by a fall of rock from the roof, on the ground of insufficient inspection, is one of fact to be determined by the jury on the trial of the case.

Ahlson v. High Bridge Coal Co. (Iowa), 163 Northwestern 219, p. 220.

MINER CHOOSING UNSAFE METHOD.

The rule that an employer is not liable where there is a safe way and an unsafe way for an employee to perform a particular service and where he chooses the unsafe way, when he knows and appreciates, or in the exercise of ordinary care should know and appreciate the danger attending the unsafe method, does not apply where such unsafe way selected by the miner was caused by the negligence of the employer and of which negligence the employee was ignorant.

Kitchen v. Hillside Coal Co. (Kentucky), 194 Southwestern 791, p. 792.

ADOPTING UNSAFE WAY TO DO DANGEROUS WORK.

Where there is a safe way and an unsafe way of doing dangerous work, and a mine operator directs a miner to do the work in the unsafe way, and the miner does not understand and appreciate the danger attending the unsafe manner which he has been directed to follow and it was not so obvious as to charge the miner with notice, the mine operator is liable for an injury sustained by the miner in the progress of the work on account of the unsafe plan adopted if the miner was exercising ordinary care for his own safety. This principle applies to an improper and unsafe method adopted in removing pillars from a mine.

Proctor Coal Co. v. Crabtree (Kentucky), 194 Southwestern 101, p. 103.

METHOD OF REMOVING PILLARS.

Where coal has been mined out of a mine and the miners begin removing the pillars and stumps, and unless these are removed in a proper manner there is increased and unusual dangers to the miners engaged in this work. The better and safer plan in removing pillars and stumps is to begin at the head of the entry and take all the coal in each stump in regular order from the head of the entry to the mouth of the mine, so that the roof may fall in where the stumps are taken out and thus relieve the pressure on the other parts of the roof and prevent creeping. It is an improper and negligent method of removing pillars and stumps by removing parts of each along the entire entry at the same time, as in such case when parts of the pillars or stumps are removed the support would not be sufficient to hold the mountain in place and it would creep or move toward the mouth of the entry, and a miner, though experienced and with knowledge of the dangerous operation in removing the pillars, may recover for injuries caused proximately by the adoption of such negligent method of removing pillars or robbing a mine.

Proctor Coal Co. v. Crabtree (Kentucky), 194 Southwestern 101, p. 102.

State v. Ellison (Central Coal & Coke Co. v. Ellison) (Missouri), 195 Southwestern 722.

USE OF ELECTRIC CABLES—CARE REQUIRED.

It is negligence on the part of a mine operator knowingly to leave a heavily charged electric wire cable uninsulated at a place where a miner or employee was liable to step on and did step on such cable, thereby causing his death. A mine operator is charged with the highest degree of care in looking after the safety of heavily charged wires that are situated in exposed places.

Kitchen v. Hillside Coal Co. (Kentucky), 191 Southwestern 791, p. 792.

EXERCISE OF CARE—INJURY TO PEDESTRIAN.

The tipple of a coal-mining company was located on a sidetrack 10 or 12 feet above the main line of a railroad. The company's coal was loaded into the railroad cars at its tipple and it was the custom of the company while so loading the cars to have present upon the cars employees whose duties it was to pick the "slate" and "bone" out of the coal as it was being loaded into the cars and cast it down the hill in the direction of the main line of the railroad, with the view of having it finally thrown across the main lines of the track into a stream. The coal company, through its chief engineer and servants, knew that pedestrians frequently passed up and down the railroad tracks, and it must have known that heavy lumps of slate and bone thrown over the cars at the tipple down upon the railroad tracks were liable to strike and injure some person. Under such circumstances it was the duty of the coal company and its employees while so throwing the slate and bone from its cars to keep a reasonable lookout to avoid injury to persons who happened to be passing on the railroad tracks. Persons walking upon and passing along the railroad tracks, whether with or without the permission of the railroad company, did not thereby become trespassers as to the coal company so as to relieve it of the duty to use reasonable care to avoid injuring them. In throwing slate or bone upon the railroad track the coal company was a trespasser in the same sense of a person walking upon the track. An employee of the coal company, though not at the time actually engaged in work for the company and who while passing on the railroad track was struck upon the head and injured by a lump of slate or bone thrown by the company's employee from the car as it was being loaded may maintain an action against the coal company for damages flowing from such injury.

Cox v. United States Coal & Coke Co. (West Virginia), 92 Southeastern 559, p. 561.

SERVANT'S KNOWLEDGE OF DANGER.

An employer is not responsible for the dangerous situation of an employee if the danger was known to the employee or was obvious to anyone of ordinary intelligence and the employee accepts the

employment knowing the danger and with ample opportunity to guard against it.

Wiggins v. Standard Oil Co., 141 Louisiana —, 75 Southern 232, p. 233.

LEAVING LUMPS OF COAL BESIDE THE TRACK.

A brakeman or snapper while riding on the brake rod of a motor was injured by reason of one foot coming in contact with a large lump of coal that lay near the track and his foot was thereby knocked against and under the wheels. The mine operator can not be charged with negligence and held liable for the injury to the brakeman because lumps of coal were left near the track where the brakeman had equal opportunity of observing the lumps of coal and did know and had known for weeks previous that the lumps of coal were there and knew of the probability of his foot striking the lumps of coal while so standing on the brake rod.

Vilsock v. Youghiogheny & Ohio Coal Co. (Pennsylvania), 100 Atlantic 530, p. 532.

MINERS RIDING ON CARS—LIABILITY FOR INJURY.

A rule of a coal-mine operator to the effect that all persons who ride upon any incline or upon any car, engine, or motor do so at their own risk will not absolve the operator from liability for damages to a miner injured while riding on a car on the ground of negligence where there was little effort made to enforce the rule and especially against the night shift, and where the injured miner, working on the night shift, had been directed by the foreman to catch the trip at the tippie and ride into the mine, and where it was a custom for all the workmen to ride, and where the custom of riding the trip was known, or should have been known, to the mine operator if he had been reasonably observant. His failure to enforce the rule proves his acquiescence in its violation. Under such circumstances the mine operator was negligent in failing to maintain the cars and track in a reasonably safe condition for the purpose for which they were used.

Simpson v. Carter Coal Co. (West Virginia), 91 Southeastern 1085, p. 1086.

EFFECT OF WORKMEN'S COMPENSATION ACT.

It was not the purpose of the Legislature of West Virginia in passing the workmen's compensation act to relieve an employer from liability for a negligent act causing injury to one of his employees or a miner who happens not at the particular moment to be engaged in performing labor for him; but where an injury is the result of a negligent act of an employer, a mine operator, the injured miner has a right of action against the operator as at common law.

Cox v. United States Coal & Coke Co. (West Virginia), 92 Southeastern 559, p. 561.

LIABILITY OF LESSOR FOR NEGLIGENCE OF LESSEE.

Where the terms of a lease are neither alleged nor proved in an action by a miner employed by the lessee of a mine against the lessor for damages for alleged negligence, the lessor and owner of the mine can not be held liable for the negligent acts of the lessee or his employees.

Stearns Coal & Lumber Co. v. Spradling (Kentucky), 195 Southwestern 781, p. 782.

DUTY OF OPERATOR TO FURNISH SAFE PLACE.**DUTY TO FURNISH SAFE PLACE.**

It is the duty of a coal-mine operator to exercise reasonable care and skill to the end that the place where he requires an employee to perform labor shall be as reasonably safe as is compatible with its nature and surroundings.

Leyba v. Albuquerque Cerrillos Coal Co. (New Mexico), 164 Pacific 823, p. 825.

DUTY AS TO ENTRIES.

It is the duty of a mining company to keep the entries in its coal mine in a reasonably safe condition for their employees who are required to use them in going to and from their work.

Stearns Coal & Lumber Co. v. Spradling (Kentucky), 195 Southwestern 781, p. 782.

State v. Ellison (Central Coal & Coke Co. v. Ellison) (Missouri), 195 Southwestern 722, p. 723.

FAILURE TO FURNISH PROPS.

The failure of a mine operator to furnish props or supports for the roof on request by a miner may constitute such negligence as will render the mine operator liable for injuries to the miner caused by a fall from the roof.

Sudnik v. Susquehanna Coal Co. (Pennsylvania), 100 Atlantic 318.

PROMISE TO FURNISH PROPS—FAILURE AND LIABILITY.

Had the roof of a mine where a miner was working been supported by timbers placed thereunder in the manner usually pursued by miners in order to insure safety, a miner working at the place would not have been injured. The miner desiring to make the roof safe made two different demands for timbers and each time was directed by the superintendent and foreman to go ahead and the timber would be sent to him. He proceeded with the work and a short time thereafter a fall from the roof caused the injuries complained of. The demands made were sufficient to put the superintendent on notice that the miner needed timber and the renewed request on the day of the accident was sufficient to charge the superintendent with

knowledge that the mine foreman had failed to comply with the miner's previous demand, and under such circumstances the operator's negligence was a question of fact to be determined by the jury.

Sudnik v. Susquehanna Coal Co. (Pennsylvania), 101 Atlantic 318.

UNSAFE TRACKS—EXCESSIVE SPEED.

Where the proof shows that a miner was injured by the wrecking of a coal train on which he was lawfully riding from the mine to the tippie and that the wreck was caused by the rapid speed at which the coal train was run by the motorman and by the unsafe condition of the track, the coal-mine operator will be liable for the injuries sustained.

Simpson v. Carter Coal Co. (West Virginia), 91 Southeastern 1085, p. 1087.

PROOF LIMITED TO PLACE DESIGNATED.

In an action by a miner for injuries caused by a fall of rock from the roof of an entry at a particularly designated place in the entry the complainant is not entitled to prove that the condition of the roof of the entry at a point 50 or 75 feet distant from the place of the accident and the place designated was unsafe.

Stearns Coal & Lumber Co. v. Spradling (Kentucky), 195 Southwestern 781, p. 782.

DUTY TO PROVIDE SAFE APPLIANCES.

DEFECTIVE APPLIANCES—PROOF AND INFERENCES.

In an action by a miner for damages for injuries caused by a collision of cars and the collision was brought about by defective hooks used for coupling the cars the jury may infer negligence on the part of the mine operator from proof showing the hooks used in coupling the cars customarily became defective and that the cars having such hooks for couplings were continuously being sent to the repair shop to have the hooks repaired and rebent, and that shortly before the accident an employee stated to the superintendent that the hooks on a group of cars had become so straightened that they should be sent to the repair shop for repairs, but the superintendent directed the use of the cars a few trips more before sending them for repairs.

Fentress Coal & Coke Co. v. Elmore, 240 Federal 328, p. 330.

SAFE PLACE AND APPLIANCES.

A mine operator can not be charged with negligence and held liable to a car driver in a mine who was injured by falling from his car from the fact that the mule he was driving attempted to turn into a wrong entry, thereby jerking the car and throwing the driver off, where the place itself was not dangerous and there was abundant space between the track and the rib of coal.

Moore v. Elk Horn Consolidated Coal & Coke Co. (Kentucky), 194 Southwestern 340, p. 342.

LIVE ELECTRIC WIRES.

A coal-mine operator is guilty of negligence in failing to maintain safe appliances where he permits a heavily charged cable to become uninsulated and knowingly leaves the same in a place where miners are liable to step on or come in contact with it.

Kitchen v. Hillside Coal Co. (Kentucky), 194 Southwestern 791, p. 792.

DEFECTIVE COAL-CUTTING MACHINE—QUESTION OF FACT.

A miner was injured in the operation of an electric coal-cutting machine where by reason of certain alleged defects the controller stuck to the fourth contact so that the operator was not able instantly to turn off the power and stop the machine, in consequence of which the cutter bit chain revolving at high velocity came in contact with the sumping bar and whirled it against the operator, producing the injuries complained of. In furnishing power to the cutting machine there were separate contacts by which the speed could be increased or diminished, but at the time of the injury it was alleged that the first, second, and third contacts were entirely useless and that the fourth contact was defective in that the controller stuck when placed on the fourth contact. Under such circumstances the question of whether the alleged defect in the contacts was the proximate cause of the injury and whether or not the accident would have happened had the operator used the first live contact and whether the accident would have happened with the controller on the fourth contact if the operator could have gotten the power off quick enough are all questions of fact to be determined by the jury in connection with all the circumstances of the case.

Beck v. Beck Coal & Mining Co. (Iowa), 162 Northwestern 861.

ACTS OF MULE DRAWING COAL CAR.

A mine operator is not to be charged with negligence on the ground of the failure to furnish safe appliances or of negligence because of the acts of a mule where there was no reason for the operator to believe or anticipate that a mule would shy or from any other cause would leave the main entry and pull the car on which the driver was riding off the track in an attempt to enter a certain entry and thereby endanger the safety of the driver or cause injuries by his falling from the car.

Moore v. Elk Horn Consolidated Coal & Coke Co. (Kentucky), 194 Southwestern 340, p. 342.

COAL CARS AND TRACKS.

A coal-mining company that knowingly permits or acquiesces in its employees habitually riding on its coal cars in and out of the mine is bound to use reasonable care to maintain its tracks and cars

in a reasonably safe condition considering the purpose for which such appliances were designed and constructed; but it would not be reasonable and it is not expected to keep them in as safe a condition as cars built for passenger traffic.

Simpson v. Carter Coal Co. (West Virginia), 91 Southeastern 1085, p. 1086.

RULE AS TO SIMPLE APPLIANCES.

The rule that an employer must furnish his employees with safe tools with which to do their work has little or no application to such a simple tool as a sledge hammer, having no other defect than that it was heavier than necessary for the work to be done with it.

Wiggins v. Standard Oil Co., 141 Louisiana —, 75 Southern 232, p. 233.

OPERATOR'S PROMISE TO REPAIR.

DANGERS OBVIOUS—RIGHT TO RELY ON PROMISE.

A brakeman on coal cars hauling coal in and out of a mine was required to operate the brakes, couple and uncouple the cars, and throw the switch in taking the motor and cars in and out of the mine. Most of his duties were to be performed on the ground and he was supposed to walk the short distance from the place of coupling and uncoupling the cars to the switch at the pit's mouth. Instead of walking this distance or riding in a safe place on the rear of the motor, he was in the habit of jumping on the moving motor and standing with one foot on the brake rod near the ground while going from the place of coupling and uncoupling the cars to the switch. He knew of the presence of large blocks of coal near the side of the track and complained to the foreman of the presence of the coal and the foreman promised to remove them. While so riding and before the coal had been removed, the brakeman was injured by one foot striking a lump of coal and being driven against and under the wheels. The failure of the foreman to remove the lumps of coal as promised can not be held sufficient to charge the mine operator with negligence and to hold him liable to the brakeman for damages for the injury, where the brakeman was not performing his duties in the manner in which they could have reasonably been performed and where there is nothing to show that it was necessary for the brakeman in the proper performance of his duty to ride on the rod of the moving motor and where he easily could have walked the distance as the snapper often did and reach the switch ahead of the motor. Under such circumstances the injured employee can not set up the alleged promise to remove the coal as an excuse for continuing the dangerous practice of riding on the motor.

Vilsock v. Youghiogheny & Ohio Coal Co. (Pennsylvania), 100 Atlantic 530, p. 532.

DIRECTIONS TO CONTINUE WORK UNTIL REPAIRS WERE MADE.

The operator of an electric coal-cutting machine is not to be charged with such contributory negligence as to defeat his action for a recovery for injuries sustained in the operation of the machine where he had complained to the mine operator of certain defects in the machine by reason of use and wear and where he had been directed to do his work in the manner he was doing it so far as the particular defects complained of were concerned, and where it appears that the injuries received were due proximately to the particular defects complained of.

Beck v. Beck Coal & Mining Co. (Iowa), 162 Northwestern 861, p. 865.

RULES AND REGULATIONS.**ACQUIESCENCE OF OPERATOR IN VIOLATION OF RULES.**

A coal-mine operator may absolve himself from liability for damages in many instances by making and promulgating rules for the conduct of the employees, either in prescribing the methods of using appliances or prohibiting their use for certain specified purposes. But if a mine operator acquiesces in the use of an appliance for some prohibited purpose or for some purpose other than that which it was intended, it puts him in the same position as if the prohibition had not been made or as if the appliance had been originally furnished for the purpose for which it was used. Acquiescence in the violation of a rule or in the use of an appliance for a purpose other than that for which it was intended does not absolve a mine operator from liability for damages for injuries caused by the use of the appliance.

Simpson v. Carter Coal Co. (West Virginia), 91 Southeastern 1085, p. 1086.

RIDING ON COAL CARS PROHIBITED.

Mine tracks and cars are not designed for carrying passengers but it is well known that miners often ride in uncomfortable and even unsafe vehicles rather than walk in and out of the mine. Many coal-mining companies promulgate rules warning miners against riding on the cars, intending thereby to protect the miners from injury and themselves from liability therefor. A rule of a mining company warning all persons who ride upon any incline, car, engine, or motor that they do so at their own risk will absolve the mining company from liability if it is strictly enforced.

Simpson v. Carter Coal Co. (West Virginia), 91 Southeastern 1085, p. 1086.

NEGLIGENCE OF FOREMAN OR OFFICER.**NEGLIGENCE OF FOREMAN ACTING AS SUPERINTENDENT.**

A mine foreman in addition to his statutory duties was also the duly authorized representative of a coal-mine operator with authority to employ and discharge miners and to assign them to their

places of work in the mine. The foreman negligently and without notice or warning assigned a miner, ignorant thereof, to work at a place that suddenly became dangerous and was known to the foreman to be dangerous and by reason of which the miner was injured. The foreman in such case becomes the representative of the mine operator and renders him liable for the injuries sustained by the miner, if the latter was free from fault.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southeastern 92, p. 96.

RULES REGULATING OPERATIONS.

A mine operator can not relieve himself from all liability by adopting and promulgating a set of rules and then intrust the entire conduct of his mining business and the enforcement of the rules to the mine foreman, whose statutory duties have to do with the ventilation and the interior of the mine. The foreman could have nothing to do with reference to an accident which happened outside and almost a mile from the drift mouth.

Simpson v. Carter Coal Co. (West Virginia), 91 Southeastern 1085, p. 1087.

INDIVIDUAL OPERATIONS OF PRESIDENT—LIABILITY OF CORPORATION.

A corporation was chartered for the purpose of mining coal and producing salt, and engaged in both occupations for a number of years. It then turned over to its president and general manager the business of mining coal on his own account, but who did so under a fictitious name and continued all the while president and general manager of the corporation. He employed men to work in the mine, without disclosing whether for himself or for the corporation, and paid them at the same place and in the same manner in which employees in the salt works were paid, thereby inducing the employees to believe that they were employed by him as manager of the corporation. Under such circumstances the corporation is liable to a miner for an injury occasioned by the negligence of the president and general manager to the same extent as if the relation of master and servant actually existed between the corporation and the injured miner.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southeastern 92, p. 94.

NEGLIGENCE OF FELLOW SERVANT.

NEGLIGENCE OF MOTORMAN—PROOF.

In an action by a miner for damages for injuries caused by being run over by a mine car, a brakeman can not properly testify that the motorman operating the motor that hauled the car was careless and reckless in the operation of the car, as this is a conclusion of the witness upon an issue on which it is the province of the jury to pass.

Strawn Coal Co. v. Trojan (Texas App.), 195 Southwestern 256, p. 257.

NEGLIGENCE OF OPERATOR AND MOTORMAN

Where the proximate cause of an injury to a miner is the combined negligence of the mine operator in failing to maintain reasonably safe tracks and cars on which the miners ride and the negligence of the motorman in running the cars at an excessive rate of speed, the mine operator is liable for damages for injuries resulting to a miner.

Simpson v. Carter Coal Co. (West Virginia), 91 Southeastern 1085, p. 1086.

MINER'S WORKING PLACE—SAFE PLACE.**DUTY OF MINER TO KEEP PLACE SAFE.**

Under the mining law of Missouri it is the duty of the miner to keep his working place safe.

State v. Ellison (Central Coal & Coke Co. v. Ellison) (Missouri), 195 Southwestern 722, p. 723.

SCOPE OF EMPLOYMENT.

The fact that a miner, with other miners, passed temporarily from his working place into a crosscut to avoid the presence of smoke as a result of shots and there awaited the clearing of the smoke before resuming his work did not take him without the scope of his employment, as this was a proper and reasonable act, and the miner is entitled to recover for an injury while in such crosscut, due to the negligence of the mine operator.

Rapson Coal Co. v. Micheli (Colorado), 164 Pacific 311, p. 312.

APPLICATION TO ENTRY.

A common laborer sent from one part of a mine to an entry to load dirt is not in his working place and he has no duty of inspection or of timbering the entry.

Ahlson v. High Bridge Coal Co. (Iowa), 163 Northwestern 219, p. 221.

TESTING FUSE.

Where it is the duty of a miner to load the drill holes with powder and attach the fuse ready for the shot firer and where the miner had experienced difficulty with defective fuses, and inasmuch as the defective fuse must result in a misfire, it is in the interest of the employer as well as the employee that defective fuses should be avoided where it is reasonably possible to save time and to avoid the danger. Under such circumstances a miner is within the scope of his service and performing the duties of the employment in testing fuses.

Rapson Coal Co. v. Micheli (Colorado), 164 Pacific 311, p. 312.

DUTY OF MINER TO OBSERVE DANGEROUS CONDITIONS.

The rule that a miner must examine and make safe his working place applies where an experienced miner was employed to widen an entry so that an additional track could be laid. In such case it is the duty of the miner to examine the roof of the entry at the place where he had blasted down the coal to see that the roof was safe before beginning work under it.

Stearns Coal & Lumber Co. v. Spradling (Kentucky), 195 Southwestern 781, p. 783.

DUTY TO WARN OR INSTRUCT.**FAILURE TO WARN EXPERIENCED MINER.**

No duty is imposed upon a mine operator to warn an experienced miner where he is engaged in taking down the roof of an entry and where he knew or must have known all that the operator could have told him by the warning, and especially where he was warned of the danger and instructed as to the method of proceeding by other miners assisting in the work. Where a miner is as fully aware of dangers and how to avoid them as he could be had he been warned and instructed by the operator, there can be no negligence in failing to instruct as to that which the miner already knew.

Holmes v. Bloomfield Coal & Mining Co. (Iowa), 162 Northwestern 820, p. 824.

CONTRIBUTORY NEGLIGENCE OF MINER.**KNOWLEDGE OF DANGER THAT PREVENTS RECOVERY.**

The operator of an electric coal-cutting machine was injured by the sumping bar being thrown violently against his foot and ankle due to certain alleged defects in the manner of controlling or the putting on or taking off the power. The question as to whether or not the operator had knowledge that it was dangerous to place the sumping bar in such position, if it was dangerous, was one of fact to be determined by the jury and it was for the jury to say whether in view of his past experience in so placing the bar and in view of the physical facts themselves as to the manner of placing and the weight of the bar, the operator had reason to believe it was an improper thing to do; and under such circumstances the question of the operator's contributory negligence in so placing the bar was also for the jury to determine. But there is a vital difference between knowledge of the extent and character of a danger and knowledge of a defect which a danger lurks in, the extent or imminence of which was not discoverable to the operator by the reasonable use of the opportunity his situation afforded. The fact that the operator's work with the coal-cutting machine was to some extent dangerous, and was known

to him, does not necessarily charge him with negligence in the performance of his duties with the machine.

Beck v. Beck Coal & Mining Co. (Iowa), 162 Northwestern 861, p. 865.

DANGER IMMINENT—QUESTION OF LAW.

It requires a very clear case of danger so imminent or so great that a court may say as a matter of law that an employee is chargeable with contributory negligence in doing his work according to the order or instructions of his employer.

Beck v. Beck Coal & Mining Co. (Iowa), 162 Northwestern 861, p. 865.

DANGER NOT OBVIOUS.

A miner performing his duties in a mine and injured while obeying the order of the foreman who had control of the work is not chargeable with such contributory negligence as will defeat a recovery, unless the danger incurred by such obedience is so great and imminent that a prudent person would not assume the risk.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southeastern 92, p. 97.

DANGER NOT OBVIOUS—DIRECTIONS TO PROCEED WITH WORK.

An action by a miner for damages for injuries caused by a fall from the roof of his working place can not be defeated on the ground of contributory negligence or the assumption of risk by continuing work in a dangerous place where, on making demands for props, he had been directed by the superintendent and foreman to proceed with the work and timbers would be sent him, and where the dangerous condition at the particular place was in no sense obvious.

Sudnik v. Susquehanna Coal Co. (Pennsylvania), 101 Atlantic, p. 318.

BURDEN OF PROOF.

When the evidence is conflicting or when different inference may be drawn therefrom, the burden of establishing contributory negligence on the part of an injured miner is upon the defendant, the mine operator, regardless of whether the evidence in this respect comes from the plaintiff's or the defendant's witnesses, and in every event contributory negligence must be established by a preponderance of the evidence given upon that subject.

Dimmick v. Utah Fuel Co. (Utah), 164 Pacific 872, p. 875.

SUPERINTENDENT'S AUTHORITY OVER INSPECTOR.

An employee in a mine whose duty it was to inspect the coal cars, and who was injured while riding on one of the cars because of defective couplings, is not to be charged with contributory negligence and a recovery prevented on the ground that he failed to inspect and

report the defective condition of the cars where it is shown that the defective condition was reported to the superintendent of the mine and that he directed the further use of the cars before the defective appliances should be repaired.

Fentress Coal & Coke Co. v. Elmore, 240 Federal 328, p. 331.

TESTING FUSES NEAR POWDER CAN—INJURY FROM EXPLOSION.

A miner whose duty it was to fill his drill hole with powder and attach the fuse for the shot firer, and who had had difficulty with defective fuses, is within the scope of his employment and engaged in the line of his duty where he makes a simple test to discover whether or not a fuse is defective, and the fact that a fellow miner while testing a fuse threw a lighted part of the fuse in the direction of a can of powder, thereby causing an explosion resulting in an injury to the complaining miner, does not make the injured miner guilty of contributory negligence because he did not remonstrate with his fellow miner or leave the place when the latter began to test the fuse. The circumstance of testing a fuse was neither unusual nor dangerous if done with the exercise of reasonable prudence, and the explosion was the result of the unexpected—the negligent act of the miner in casting the fuse in the direction of the powder; but this does not subject the miner acting within the scope of his employment to the charge of contributory negligence.

Rapson Coal Co. v. Micheli (Colorado), 164 Pacific 311, p. 313.

NEGLIGENCE OF CAR DRIVER IN DRIVING MULE.

An experienced driver of mules hauling coal cars in a mine who, instead of holding the lines in his hands by which to guide and direct the mule drawing the car on which he was riding, fastened the lines to the harness and attempted to guide and direct the mule by words is guilty of such contributory negligence as will prevent a recovery for injuries caused by the mule suddenly turning from the main entry into a cross entry, thereby derailing the car and causing the injuries complained of.

Moore v. Elk Horn Consolidated Coal & Coke Co. (Kentucky), 194 Southwestern 340, p. 342.

FREEDOM FROM CONTRIBUTORY NEGLIGENCE—MINER WORKING NEAR ELECTRIC WIRE.

A hostler or an assistant in operating a coal-mining machine and whose duty it was to assist in loading the machine on a truck can not be charged with contributory negligence and a recovery for his death prevented where, while assisting in loading the machine on a truck, he stepped on the reel cable used to connect the main

cable with the operating machine, on the ground that he failed or neglected to disconnect the reel cable from the main cable; but where it was made to appear that it was the custom to load the machine on the truck without disconnecting the reel cable and where it was also shown that the insulation on the cable had become worn and defective and the live wire exposed, and where the mine operator, through the mine foreman, had knowledge of the defective condition of the reel cable and the deceased hostler or assistant did not know of such defects.

Kitchen v. Hillside Coal Co. (Kentucky), 191 Southwestern 791, p. 793.

SHOTS FIRED BY MINER—FAILURE TO INSPECT.

An experienced miner employed to widen an entry fired two shots to blow down the coal from the rib near the roof of the entry is guilty of such contributory negligence as will prevent a recovery, where shortly after he returned to the place where the shots had been fired and remained under the roof without making any inspection or test to ascertain the condition of the roof at the place where the shots had been fired.

Stearns Coal & Lumber Co. v. Spradling (Kentucky), 195 Southwestern 781, p. 783.

INJURY IN ENTRY—FAILURE TO SEEK REFUGE HOLE.

In an action by a miner for injuries sustained by being run over by a mine car while he was passing through an entry, the proof showed that at the time of the injury the miner was passing through an entry alongside of the mine track and that the entry was equipped with manholes or places of refuge at intervals not exceeding 60 feet, and that at the place where the miner was struck he heard the noise and roar made by the moving motor and cars for a distance of 500 feet, and that he saw the headlights of the approaching motor at a distance of 140 feet from the place of the accident, and that he had ample time to reach and take refuge in one of the manholes until the passing of the motor and the cars. Under such circumstances the question of the miner's contributory negligence in failing to take refuge in one of the manholes is one of fact to be submitted for the determination of the jury on the trial of the case.

Strawn Coal Co. v. Trojan (Texas App.), 195 Southwestern 256, p. 258.

METHOD OF OPERATING CUTTING MACHINE—USE OF SUMPING BAR.

The operator of an electric coal-cutting machine, injured by the sumping bar being kicked or knocked against his foot, is not to be charged with such contributory negligence as will defeat his recovery because he left the bar in the position in which it was customary to

leave it, though the position was dangerous and where it was customary to set the machine and to kick it by its own motion into place before the sumping bar was properly anchored to the jack pipe, and especially where the jumping of the machine that whirled the sumping bar against the operator's foot was due to defects in the contacts by reason of which the operator was not able to shut off or decrease the power.

Beck v. Beck Coal & Mining Co. (Iowa), 162 Northwestern 861, p. 866.

VIOLATION OF RULES—DEFENSE OF CONTRIBUTORY NEGLIGENCE.

The workmen's compensation act of Arizona (par. 3157), provides that an employer shall by rules, regulations, or instructions inform his employees engaged in dangerous and hazardous occupations as to the duties and restrictions of their employment for their protection and safety; and where during the course of the employment an employee so informed or instructed does an act beyond his duty or in violation of the restrictions of his employment dangerous in character and suffers injury thereby, the employer may defend upon the ground of contributory negligence, but the defense must be specially pleaded and determined as an issue of fact. The statute restricts the employer's right in this defense, but does not abolish the right.

Inspiration Consolidated Copper Co. v. Mendez (Arizona), 166 Pacific 278, p. 284.

RIDING ON BRAKE ROD OF MOVING MOTOR.

A person was employed as a snapper or brakeman in connection with an electric motor used for hauling coal cars out of a coal mine, and his duties consisted in manipulating the brakes on the coal cars and in coupling and uncoupling the coal cars and in throwing a switch. All of these duties excepting the uncoupling of the motor were to be performed while standing upon the ground. The motor had to run a distance of some 300 feet from the place where it was uncoupled from the loaded cars to be coupled up with the empty cars, and the snapper or brakeman was supposed to walk this distance in performing his duties. There was a place on the rear of the motor where he could ride in safety, but, instead of walking or instead of taking the safe place at the rear of the motor, he was in the habit of jumping upon the side of the moving motor with his foot upon the brake rod and riding in that position the short distance to the switch. The brake rod was round and smooth and not intended for such purpose and was so near the ground that there was danger of striking an obstruction. While so riding with his right foot on the brake rod, his left foot struck against a lump of coal lying near the track and the blow knocked the foot under the wheels of the motor and so crushed it as

to require amputation. Under such circumstances the negligent conduct of the injured snapper was such as to prevent a recovery.

Vilsock v. Youghiogheny & Ohio Coal Co. (Pennsylvania), 100 Atlantic 330, p. 531.

EMPLOYEE CHOOSING DANGEROUS METHOD OF WORK.

Where two ways of discharging a service of employment are open to an employee, one dangerous and the other safe or reasonably so, it is the duty of the servant to select the safe way, whether or not it is the least convenient to him; and if he chooses the dangerous method of performing the service, and the danger is such that a reasonably prudent man would not incur the risk under the same circumstances, he is guilty of such negligence as will bar a recovery, although the employer may also have been guilty of negligence.

Vilsock v. Youghiogheny & Ohio Coal Co. (Pennsylvania), 100 Atlantic 330, p. 532.

LAW OF FOREIGN STATE.

In an action brought by a miner in the State of Missouri for injuries received while working in a mine in the State of Kansas it was proper to exclude evidence tending to show contributory negligence on the part of the miner where under the laws of the State of Kansas contributory negligence does not prevent an injured miner from recovering damages.

Church v. Central Coal & Coke Co. (Missouri, App.), 195 Southwestern 573, p. 574.

ASSUMPTION OF RISK.

RISKS ASSUMED.

KNOWLEDGE OF DANGER.

A miner employed and working in a mine assumes all the ordinary risks of the service and all of the extraordinary risks such as those due to the operator's negligence of which he knows and the dangers which he appreciates.

Leyba v. Albuquerque Cerrillos Coal Co. (New Mexico), 164 Pacific 823, p. 825.

A brakeman or snapper, whose duties consisted in operating the brakes on coal cars and in coupling and uncoupling the cars and throwing a switch for the motor, was in the habit of jumping on the moving motor and standing with his foot on the brake rod, a smooth round rod that was near the ground, in order to ride the short distance from the place of coupling and uncoupling the cars to the switch at the pit mouth. While so riding, with his right foot on the brake rod, his left foot struck a piece of coal that lay near the track by which his foot was knocked against and under the wheels of the motor and crushed. The lump of coal which caused the accident was in plain view and was seen by the brakeman when he stepped on

the motor, and he knew that the same lump of coal had been there for two or three weeks before the accident. Under such circumstances he voluntarily assumed the risk of any injury arising from contact with the coal.

Vilsoek v. Youghiogheny & Ohio Coal Co. (Pennsylvania), 100 Atlantic 530, p. 532.

DANGERS THREATENING IMMEDIATE INJURY.

An employee assumes the risk where the dangers are of such a character as to a man in the exercise of average care and precaution similarly situated would appear to threaten immediate injury to the employee.

Dimmick v. Utah Fuel Co. (Utah), 164 Pacific 872, p. 875.

RIDING ON MOVING MOTOR—DANGER OBVIOUS.

A brakeman or snapper employed by a coal-mine operator whose duties consisted in operating the brakes on the coal cars and in coupling and uncoupling the coal cars and in throwing the switch for the motor, loaded and empty cars. He had no occasion to ride upon the motor, as his place was near the rear of the train, and it was his business to walk the short distance from where the cars were coupled and uncoupled to the switch near the pit mouth. There was a safe place on the rear of the motor on which he could ride, but, instead of walking or taking the safe place on the motor, he was in the habit of jumping upon the side of the moving motor with his foot upon the brake rod and riding in that position the short distance to the switch. There was danger of his foot slipping from the rod and going under the wheels, and, as the rod was near the ground, there was danger of striking an obstruction or lumps of coal that lay near the track. The evidence of the superintendent, the mine foreman, machinist, boss motorman, and other witnesses was that the brakeman was warned against the risk which he incurred in attempting to jump upon the side of the moving motor. But under such circumstances it was not necessary to warn him, as his employment as a snapper for months prior to the accident must have given him a full understanding of the situation. The danger incident to jumping on the side of the moving motor was obvious, and the possible result of a misstep or a slip of the foot from the brake rod situated so near the wheels was one which a person of his age and intelligence was bound to foresee.

Vilsoek v. Youghiogheny & Ohio Coal Co. (Pennsylvania), 100 Atlantic 530, p. 531.

MINER ENLARGING ENTRY.

An experienced miner employed by a coal-mine operator to broaden an entry in the mine for the laying of an additional track assumes

the risks of danger arising from the work and the conditions of the roof for firing shots to blow down the coal in the wakening operations.

Stearns Coal & Lumber Co. v. Spelling (Kentucky), 106 Southwestern 781, p. 788.

ORDINARY ACTS OF MULE.

A coal-car driver assumes the danger incident to the usual and ordinary acts of a mule in hauling coal cars, such as a tendency to shy or an attempt on the part of the mule to turn suddenly from the main entry into a cross entry, thereby throwing the car from the track and injuring the driver.

Moore v. Elk Horn Consolidated Coal & Iron Co. (Kentucky), 104 Southwestern 340, p. 342.

USE OF SIMPLE TOOLS.

The danger incident to a defect in a simple appliance, such as a sledge hammer, is an obvious danger of which the employee assumes the risk, especially if he has had experience in the use of such a tool.

Wiggins v. Standard Oil Co., 141 Louisiana —, 76 Southern 242, p. 243.

MINER ENGAGED IN REPAIR WORK.

A miner or employee engaged in construction or repair work in a mine assumes the risks which are obviously incident to the work of such construction or repair and can not complain of the ways, works, or machinery as being defective when that defect is the very cause of the employee being there and at work. An employer can not be held to the same degree of strictness while he is constructing his plant or repairing the ways, works, or machinery as is required of him after the plant or the repairs are completed and in operation.

Corona Coal & Iron Co. v. Amerson (Alabama), 76 Southern 281.

RISKS NOT ASSUMED.

EXTRAORDINARY RISKS NOT ASSUMED.

An extraordinary risk is one that is not uncommon or unusual in the sense that it is rare, but is one that arises out of unusual conditions not resulting in the ordinary course of business as by reason of the operator's negligence.

Leyba v. Albuquerque Cerrillos Coal Co. (New Mexico), 164 Pacific 823, p. 825.

DOCTRINE OF NONASSUMPTION OF EXTRAORDINARY RISKS.

The determination of an employee's nonassumption of extraordinary risks has arisen as an exception to the common-law rule of assumed risk may be said to rest primarily upon the consideration that as the employer has control of the conditions that affect the employee's safety he is the party who ought in fairness to be held responsible if those conditions are not such as a prudent man would

maintain under the circumstances. Extraordinary risks are not assumed, because they are not the natural and ordinary incidents of the work of an employee.

Leyba v. Albuquerque Cerrillos Coal Co. (New Mexico), 164 Pacific 823, p. 825.

WANT OF KNOWLEDGE OF DANGER.

An employee in connection with the operation of a coal mine and whose duties were that of an outside foreman, injured by a large lump of coal falling from the shaker and striking him on the head, can not be held to have assumed the risk of coal so falling while attempting at the direction of the operator to turn on steam to start the shakers, and while performing the duty and without his knowledge the operator started another stationary engine that operated the shaker, thereby causing a piece of coal to fall down upon the plaintiff.

Dimmick v. Utah Fuel Co. (Utah), 164 Pacific 872, p. 876

DEFECTIVE RUNWAY.

A person employed in a mine for the handling, running and dumping and operating of the tram cars along the tramway of the employer's mine and dumping place, and whose duty it was to pass or run along the runway adjacent to and about 4 feet lower than the track of the tramway and to insert sprags between the spokes of the wheels in order to retard the motion of the car, does not assume the risk of the dangerous condition of the runway, as the employee in the discharge of the duty of spragging the wheel was required to run alongside the car with one hand upon the car and with his eyes upon the wheel in order to insert the sprag between the spokes to slow down the speed, all of which clearly and imperatively required that the operator should use reasonable care in preserving the runway in a safe condition.

Leyba v. Albuquerque Cerrillos Coal Co. (New Mexico), 164 Pacific 823, p. 825.

LAW OF FOREIGN STATE.

In an action by a miner in the State of Missouri for injuries sustained while working in a coal mine in the State of Kansas, it is proper to exclude evidence tending to show the assumption of the risk on the part of the miner, where, under the laws of the State of Kansas, the assumption of risk can not be shown as a defense in an action for damages for injuries received in the course of the employment.

Church v. Central Coal & Coke Co. (Missouri App.), 195 Southwestern 573, p. 574.

PROXIMATE CAUSE OF INJURY.

DEFECTIVE APPLIANCES—PROXIMATE CAUSE.

In an action for damages by a miner injured by a collision of the car on which he was riding with a derailed car, caused by his car

becoming uncoupled from the cut of cars and the cut of cars proceeding down grade at a greater rate of speed, the rear car, without the other car to steady it, was thereby derailed, the jury may infer that the derailment was the proximate cause of the injury and that it was brought about by reason of a defective coupling by which the car on which the miner was riding became uncoupled from the car that was derailed.

Fentress Coal & Coke Co. v. Elmore, 240 Fed. 328, p. 330.

INSTRUCTION AS TO REMOTE CAUSES OF INJURY NOT PROPER.

When in an action by a miner for damages for injuries the uncontradicted evidence shows that the only act of negligence that could be regarded as the proximate cause of the injury was the negligent operation of a trip of cars that collided with him, the court on the trial of the cause should not submit instructions to the jury as to other alleged acts of negligence not in any way contributing to the injury.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southern 32, p. 97.

CONTRACTS RELATING TO OPERATIONS.

SALE OF MINING MACHINERY—FAILURE TO DELIVER—DAMAGES.

The seller of a turbo-compressor or blowing machine made for use in connection with a coal company's blast furnace can not recover damages from the buyer for refusal to receive and pay for the blower where it was not completed and delivered within the time stated in the contract and where the seller had notice of the particular use to which it was to be applied and of the buyer's emergency and where an extension of time by the buyer did not amount to a removal of the time limit in which the blower was to be delivered.

General Electric Co. v. Chattanooga Coal & Iron Corp., 241 Federal 38, p. 40.

CONTRACT AS TO MINING MACHINERY—OWNERSHIP AND POSSESSION.

A contract was made between the owner of a placer mine and another by which the latter should take possession of the mine, furnish machinery and material to work it, extract the gold and keep a careful account of expenses and receipts. At the end of the first season the contractee was given the option of enlarging and continuing his operations on a royalty basis, but if the enterprise was not profitable the contract was to terminate and an accounting to be had on the basis of the actual cost of the installation of the mining plant, plus the cost of operation for the mining season to be credited to the contractee, and the gold recovered to be credited to the owner. If the balance was against the contractee he was to pay the same to the owner; but if the value of the gold was less than the cost

of the plant and operation, the owner was to pay the contractee the difference and thereupon the machinery and improvements were to be the property of the owner. The contractee did not exercise the option given him and the gold recovered during the season did not equal his expenditures, but the difference was not paid by the owner. The owner resumed possession of the mine, but the contractee failed to remove his mining machinery and implements before the owner became a bankrupt and the property passed into the hands of the assignee. The contract between the owner and contractee was not a conveyance in the sense that it transfers anything that could be called realty or that constituted a lease, but was in fact no more than a contract for labor to be performed, merely fixing the compensation for the services, and the contractee was in fact no more than a licensee. But the contract in providing the manner in which the mine owner was to become the owner of the mining machinery and plant was in effect an agreement for a conditional sale, giving the seller the right of property or possession until compliance with the condition named, and on the failure of the owner to pay the difference between the expenses incurred by the contractee and the amount of gold recovered, the contractee had the title to the mining machinery and plant and had the right to remove the same and this right could not be defeated by an assignment in bankruptcy.

Seward Dredging Co., In re. 242 Federal 225, p. 228.

CONTRACT TO PUMP WATER—TERMINATION.

The lessees of certain mines and mining property by oral contract employed a third person at a specified royalty on the ore mined to pump the water from the mine and to keep it free from water. The contract was indefinite as to its term and could be discontinued by either party at any time on notice. But whether the lessee terminated the contract by a notice of termination and whether there was evidence to show that the notice was subsequently withdrawn and pumping operations continued, is a question of fact to be determined as such on the trial of the case.

Latshaw v. Stoddard (Missouri App.), 194 Southwestern 727, p. 728.

OPERATOR AS EMPLOYER—QUESTION OF FACT.

Where the evidence is conflicting as to whether or not an injured miner was employed by the mine owner and operator or by an independent contractor engaged by the coal-mining company under a special contract to perform certain work in the mine, is a question of fact to be submitted to and determined by the jury in the trial of the case.

Corona Coal & Iron Co. v. Amerson (Alabama) 75 Southern 289.

BREACH OF CONTRACT TO DRILL — PROSPECTIVE PROFITS.

A land owner entered into a contract with an oil-well driller by which for a consideration the driller should drill certain oil wells at \$4.50 per foot, but the driller should not be compelled to drill to a depth exceeding 1,000 feet in any one hole, and it was provided that the contract should cover a total of not less than 2,000 feet and not less than two nor more than four wells should be drilled. The driller began operations and on reaching a depth of 400 feet in well No. 1 it was abandoned as an oil well and by agreement was converted into and used as a water well for further operations on the property. The land owner thereupon paid \$1,800, the contract price for the 400 feet. The driller proceeded and drilled a second well to a depth of 907 feet and was prevented from drilling farther because of the failure of the landowner to comply with his part of the contract to furnish the materials agreed by him to be furnished. In an action by the driller to recover for drilling the wells under the contract the court was not bound to consider the 400-foot well as though it had been drilled to the depth of 1,000 feet. The contract does not contemplate that any well should be of a definite depth, but there was a limit to the number that should be developed. The plaintiff's consent to the drilling of well No. 1 to a depth of 400 feet was sufficient to justify the court in allowing him for that number of feet only at the contract price. The plaintiff was entitled to recover for a breach of the contract and for his loss of profits on the theory that the loss of profits on a contract of this kind is a necessary consequence of the breach and is not required to be especially pleaded nor are such profits too speculative or remote to be a basis for damages. The rule is where the prospective profits are lost by the natural and direct consequences of the breach of the contract they may be recovered.

Robinson v. Rispin (California App.), 165 Pacific 979, p. 980.

METHODS OF OPERATING.

INJURY TO MINE — RIGHT OF LESSEE TO RECOVER.

The owner of coal lands conveyed to a named grantee all the coal and other minerals in the land without liability for any damage done to the surface in consequence of mining and working out the coal. Subsequently the owner conveyed the surface to a third person, the deed excepting and reserving the underlying coal and the right to mine, together with the right to use all entries under the land and to enter upon the land for the purpose of repairing the entries when necessary. The active work of mining was suspended for a period of 15 years. During the time of such suspension the surface owners

by constructing ditches diverted the waters of a stream and caused them to flow through a pit-hole into the mine, thereby filling the entries, obstructing the mining operations, and damaging the mine. Subsequently the owner of the coal leased the same and the lessee began mining operations, but the surface owners, over the protest and remonstrance of the lessee, continued to flood and injure the mine. In an action by the lessee for damages and to recover for the injuries done to the mine after the execution of the lease, the fact that mining operations had been suspended for a period of 15 years was not available to the surface owners as a defense to the action or as a justification for wrongfully flooding the mine even during the suspended operation.

Sorg v. Frederick (Pennsylvania), 100 Atlantic 481, p. 483.

ADJACENT OWNER MINING COAL UNDER STREET—REGULATION.

The owner of coal lands abutting upon a highway or street may not mine and remove the coal from under the street, if the mining destroys or would tend to destroy the street. The owner's mining of coal on his own premises outside of the bounds of the street is *prima facie* lawful and he is not required to leave the coal for the lateral support of the street unless it is made to appear clearly that the mining of the coal will injure the street. It is within the power of a court in an action to enjoin the mining of coal from adjacent land or from under a street to determine and decree the manner in which the mining may be done and what part, if any, of the underlying coal may be mined and removed by the landowner and by its decree properly protect the interests of a city and of the public.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 813, p. 819.

RIGHT TO SUPPORT.

SEVERANCE OF SURFACE AND MINERALS WITHOUT RIGHT TO SUPPORT.

In the city of Scranton there is a tract of land on which certain public streets, avenues, and boulevards have been dedicated to the public. The surface ownership had been severed from the coal rights and the latter owned by a coal-mining company. Some of the streets were dedicated before and some after the severance of the surface and mineral rights. The surface was rightfully sold without right of support and the streets subsequently established were dedicated by the owners of the surface only and without right of support being secured from the owners of the subsurface. An application for an injunction by the city of Scranton to prevent the removal of the pillars, or what is called "second mining," by which the pillars left in a mine to support the roof and surface are mined out and removed, was denied on the ground that the evidence

did not support the conclusion that any irreparable injury to the streets in question is likely to result from the mining operations or that the mining operations are likely to occasion any peril to the safety of the traveling public in the lawful use of the streets.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 515.

CONVEYANCE WITHOUT RIGHT OF SURFACE SUPPORT.

A deed by an owner conveying coal lands reserved the coal as follows: "All the coal and minerals beneath the surface of and belonging to said lot, with the sole right and privilege to mine and remove the same by any subterranean process incident to the business of mining without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of said lot or to the buildings or improvements which now are or hereafter may be put thereon, provided that no mine or shaft shall be intentionally opened or any mining fixtures established on the surface of said premises." The grantee subsequently conveyed the lot with the appurtenances, together with the right to mine and remove the coal, but the deed contained no provision that the coal should be removed without liability for damages done to the surface. The lot was subsequently conveyed to the complainant and the deed recited: "Without, however, granting or conveying to the Lackawanna Iron & Steel Company the right to let down, injure, or destroy the surface." The deed further recited: "That it was the purpose and intent of this indenture to vest in the said party of the second part, his heirs and assigns inter alia, the right or privilege of surface support hitherto withheld." The language of the deed showed that the grantor took pains not to include the right of removal without liability for injury to the surface, and it would be a strange construction which would hold that a valuable property right passed as an appurtenance when the transfer of any such right was carefully avoided in describing the particular thing conveyed. The right to surface support was valuable in connection with the large tract of land held by the coal company, the grantor, and this fact was probably taken into account both in the sale of surface and in the sale of the coal, the latter presumably selling for a less price than it would have brought had the right to remove it without leaving support for the surface above included. If the coal company retained a considerable amount of surface land when it disposed of the coal, it was manifestly to its interest to retain for itself and for the benefit of future purchasers the right of surface support. The language of the deed does not authorize the removal of the coal without liability for injury to the surface.

Penman v. Jones (Pennsylvania), 100 Atlantic 1043, pp. 1044-1046.

RESERVATION OF SURFACE—CUSTOM AS TO SURFACE SUPPORT.

When the owner of land grants the minerals reserving the surface to himself, his grantee is entitled to mine and remove only so much of the minerals as he can take without injury to the superincumbent soil, and the plea of a custom to the contrary can not be entertained, as such a custom would be unreasonable and hence wanting in an element necessary for its validity.

Penman v. Jones (Pennsylvania), 100 Atlantic 1043, . 1045.

SALE OF COAL IN PLACE—SUPPORT NOT WAIVED.

A conveyance by a land owner of the underlying coal and reciting that all damages directly consequential and resulting from the mining and removing of the coal are waived and relinquished by the grantor, provided the grantee takes the ordinary precautions usually taken in mining and removing coal, did not release the grantee from his obligation to support the surface.

Penman v. Jones (Pennsylvania), 100 Atlantic 1043, p. 1045.

RELEASE OF SUPPORT MUST BE EXPRESS.

A conveyance of all the coal under certain described land is not in terms or by necessary implication a release of the right to surface support any more than the sale of the first story of a building, two or more stories high, would be a release of the story so sold from its visible servitude to the remainder of the building. The release of the right to support must be by express words or by necessary implication.

Penman v. Jones (Pennsylvania), 100 Atlantic 1043, p. 1045.

SUPPORT NOT RELEASED BY IMPLICATION.

The right to surface support on a sale and conveyance of the underlying coal is not to be taken away by a mere implication from language which does not necessarily impart such a result, and the right to surface support is not affected by a clause in the deed conveying coal providing that the owner of the coal in mining and removing it should do as little damage to the surface as possible.

Penman v. Jones (Pennsylvania), 100 Atlantic 1043, p. 1045.

MINERALS RESERVED—CONVEYANCE WITH RIGHT OF SUPPORT.

The owner of coal lands may sell and convey the land reserving to himself the coal with the right to mine and remove the same and without leaving any support for the surface, and if the grantor accepts such deed it is binding on him and his successors in title. But the owner of the coal, if to his profit or if he desires, may subsequently

sell and convey the coal in place and may impose upon his grantee of the coal right the duty and burden of surface support and if the grantee accepts the conveyance with such imposed obligation, he is bound thereby and can not mine out and remove the coal without providing sufficient surface support.

Pennau v. Jones (Pennsylvania), 100 Atlantic 1043, p. 1046.

MINING COAL UNDER STREET.

An abutting owner can not mine coal from under or adjacent to an established highway or street in such manner as to cause the subsidence or other injury thereto. A street is entitled to such support as will keep it in place, both laterally and vertically. The mining out of coal at the side or underneath in such manner as will destroy the street is a nuisance and may be restrained in equity at the suit of municipality.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 813, p. 819.

RIGHT TO INJUNCTION TO PREVENT REMOVAL OF SUPPORT.

An injunction will not be granted to prevent mining operations or the mining out of pillars left for surface support, at the instance of a surface owner where the surface ownership and the mineral rights have been separated and the surface conveyed without the right of support.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 813, p. 814.

INJUNCTION TO PREVENT REMOVAL—EVIDENCE INSUFFICIENT.

An injunction will not be granted at the suit of the surface owner to prevent the owner of the coal from removing the pillars left in a mine to support the roof during the mining operations, where the surface had been conveyed without the right to support and where the evidence shows that the pitch of the vein is comparatively slight, thereby minimizing the probability of surface subsidence, and where the voids choke up rapidly after a fall and for the most part the displacement is complete before it reaches the surface, and where there is only a remote possibility of any disturbance of the surface by the removal of the pillars.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 813, p. 814.

NUISANCE.

MINING COAL UNDER STREET—METHOD OF MINING.

The mining of coal from under an established highway or street in such manner as will destroy the street is a nuisance; and it is no defense in an action to restrain the work of mining to assert that the

mining was skillfully done. An encroachment on a highway is an invasion of public rights and can not be sustained on any theory of weighing the advantages and disadvantages of the different parties. Where there has been a severance of the surface from the subsurface, an established highway is entitled to the support of both.

City of Scranton v. Scranton Coal Co. (Pennsylvania), 100 Atlantic 813, p. 819.

WRONGFUL DEATH.

NEGLECTENCE OF OPERATOR—PLEADING AND PROOF.

In an action for damages for the wrongful death of a miner due to the alleged negligence of the mine operator, where such negligence consisted of the operator permitting a specified part of the roof of an entry in the mine where the deceased was ordered to and did work to be and remain dangerous and unsafe, and negligently failed to prop or otherwise support or protect the roof of the entry at a designated point and place, an instruction to the jury on the trial of the case to the effect that the defendant company would be liable if a large slab of rock fell from the side and roof of one of the entries of its mine at a point away from the working place of the deceased and killed him, and that the defendant, by its officers and agents, knew that the slab of rock was loose and dangerous, is erroneous and constitutes reversible error in that the instruction failed to limit the place in the entry where the petition charged the negligence to be and in that it failed to limit the negligence to the entry wherein the deceased was at work but described the place as one of the main entries. A court by its instruction can not enlarge the issues made by the petition and require the mine operator to meet the charge of negligence at any or all places in the roof of the mine when the petition challenges the negligence at a particular place.

State v. Ellison (Central Coal & Coke Co. v. Ellison) (Missouri), 195 Southwestern 722, p. 723.

ACTION UNDER FOREIGN STATUTE.

PROOF OF STATUTE OF FOREIGN STATE.

In an action by a miner in the courts of the State of Missouri for damages for injuries sustained while working in a coal mine in the State of Kansas, the statutes of the latter State relating to and regulating mining operations may be proved by an attorney acquainted and familiar with the laws of Kansas.

Church v. Central Coal & Coke Co. (Missouri App.), 195 Southwestern 573, p. 574.

MINING LEASES.

LEASES GENERALLY—CONSTRUCTION.

CONSTRUCTION—NATURE OF PAYMENTS.

The Federal courts follow the Supreme Court of Minnesota and hold that instruments called and operating as mining leases are leases in fact, as well as in name, and the amount stipulated to be paid by the lessees are rents and not the purchase price of the mineral in place; but the compensation which the lessee pays the landlord is for the species of occupation which the contract between them permits.

Nelson v. Republic Iron & Steel Co., 240 Fed. 285, p. 291.

MINIMUM ROYALTY—APPLICATION.

A mining lease provided that within one year after the completion of a certain railroad the lessee should mine and remove at least 10,000 tons of iron ore and that thereafter he should mine at least 10,000 tons annually, and on failure to mine such amount the lessee should pay the lessor quarterly a royalty of 25 cents per ton on 10,000 tons. This is a clear agreement to pay the stated royalty, irrespective of the mining and removal of ore. The fact that the payment is computed as royalty upon the required minimum production of 10,000 tons does not change the nature of the contract. Such provisions are not unusual in mining leases and are inserted to secure diligence and promptitude in mining. Payment of the minimum stipulated royalty where no ore was mined can not be applied on ore subsequently mined and removed.

Nelson v. Republic Iron & Steel Co., 240 Fed. 285, p. 291.

LIABILITY OF LESSEE FOR PUMPING WATER.

The lessee of a mining lease by oral contract employed a third person to pump from the leased mine water, which continuously seeped in and accumulated, on a consideration of 5 per cent of the proceeds realized by the lessee from the ore taken from the mine. Pursuant to the contract the second party equipped the mine with a pump and proceeded to, and did for a year or more, pump the water out of the mine. At the time of making the contract the lessee's lease covered several different lots some of which were operated jointly for mining purposes, and by reason of the location the water would pass from one mine or lot into another. After the pumping was undertaken the lessee sublet to the pumping contractor certain of the lots for mining

purposes and the lease specified that the sublessee should keep the demised property clear of water. The oral contract for pumping the mine was not merged into the subsequent lease as the lease did not cover and include the particular lots and mines from which the water was pumped and that were to be mined and operated by the pumping contractor as sublessee.

Latslaw v. Stoddard, (Missouri App.), 194 Southwestern 727, p. 728.

CONSTRUCTION—TITLE CONVEYED.

Mining leases do not constitute a sale of any part of the land, and the ore or mineral derived from the usual operation of open mines or quarries constitutes the rents and profits of the land and belongs to the tenant for life or years; but this rule does not apply to unopened mines in the absence of a contract for opening and leasing them.

Baumbach v. Sargent Land Co., 242 U. S. 503, p. 517.

COAL LEASES.

MINIMUM ROYALTY—APPLICATION TO UNKNOWN MINES.

A coal lease stipulated for the payment of minimum royalties on three different and particularly named coal seams. On one of these seams the lessee was to pay a stipulated royalty on a minimum production of 20,000 tons a year until the coal was exhausted. It also provided that if coal in another named vein or seam proved workable a minimum royalty of 20,000 tons per year should be paid after the mining of such vein or seam was begun, and after payments of the minimum royalty on the other seam had ceased. The lease covered all the coal underlying the tract and necessarily included all veins known and also veins subsequently discovered and mined. But the provision for a minimum royalty was expressly limited to the three named veins and contains no language which expressly evidences a purpose to place the obligation of the minimum royalty on veins subsequently discovered and mined. Neither does the language imply such a condition. When the lessor wished to impose a minimum annual royalty he knew how to select the veins and to apply suitable covenants for such purpose, and a court has no grounds for saying that the lessor meant to contract for some other vein not mentioned and where there is nothing to evidence any specific intention to subject unknown veins to a minimum royalty.

Birdsall v. Delaware Hudson Co., 240 Federal 618, p. 622.

MINIMUM ROYALTY—SUSPENSION OF OPERATIONS.

A coal-mining lease provided for the payment of a minimum royalty, but also provided that during strikes and other unavoidable

casualties over which the lessee had no control that no royalties were to become due or payable for the time that the lessee might be compelled to close down his mine for such causes, and the minimum royalty was to be reduced proportionately. Under such a clause the yearly minimum royalty is to be reduced proportionately to the number of days in the entire year, Sundays and holidays excepted.

Bennett v. Howard (Kentucky), 195 Southwestern 117, p. 118.

GROUND'S FOR DEDUCTION FROM MINIMUM ROYALTY.

A coal-mining lease required the lessee to pay an annual minimum royalty of \$2,000, but provided that the royalty should be reduced proportionately where mining operations were closed because of strikes or other unavoidable casualties over which the lessee had no control. Under such a provision three things must occur in order to entitle the lessee to a deduction from the minimum royalty: (1) The casualties must be unavoidable; (2) it must be one over which the lessee has no control; (3) it must be such as to cause the lessee to close down the mine.

Bennett v. Howard (Kentucky), 195 Southwestern 117, p. 118.

MINIMUM ROYALTY—FAILURE TO MINE OR SURRENDER LEASE.

A coal-mining lease provided for the annual payment of a stipulated royalty until the minable and salable coal should become exhausted or the quantity insufficient to warrant mining and in such case the annual payments of royalty shall cease. In an action on the lease to recover an unpaid and overdue minimum royalty the lessor is not required to prove that there is sufficient coal underlying the ground to warrant the payment of the royalty claimed. If before an annual payment of royalty had accrued or before due the lessee had determined that there was no minable coal under the leased land sufficient to justify mining and upon such grounds had surrendered the lease and refused to make further payment he might have escaped liability, but so long as he continues to exercise his rights under the lease and failed to surrender it and showed his intention to keep the lease alive by attempting to sell and assign the same, he must be held liable to pay the annual payments.

Saylor Park Land Co. v. Glenwood Coal Co. (Iowa), 162 Northwestern 203, p. 204.
Bowland v. Anderson Coal Co. (Iowa), 162 Northwestern 321.

MINIMUM ROYALTY—INABILITY TO SELL COAL.

A coal-mining lease provided for the payment of an annual minimum royalty of \$2,000 per year, but there was to be a proportionate reduction if mining operations were shut down by unavoidable

casualties over which the lessee had no control. The minimum royalty clause did not obligate the lessee to mine and ship any stated quantity of coal per year, but to pay royalty on a named quantity of coal whether mined or not unless the lessee was prevented from so doing by strikes and other unavoidable casualties over which he had no control. Under such circumstances a bad condition of the coal market and the inability of the lessee to sell the coal is not an unavoidable casualty within the meaning of the lease. It is a matter of common knowledge that the coal market may be good at one time and bad at another, and such changes are the ordinary incidents of the business and may be expected to occur at any time. Bad markets are the result of economic laws, and they come and go with such frequency that every business man must take them into account, and unless he is prudent enough to guard against them by contract he necessarily takes the risk. Such a lease is to be distinguished from leases that expressly provide for minimum royalties on coal mined and sold.

Bennett v. Howard (Kentucky), 195 Southwestern 117, p. 119.

UNAVOIDABLE CASUALTIES TO REDUCE ROYALTIES.

A coal-mining lease stipulated for the payment of a minimum royalty, but provided for the reduction of such royalty when the lessee was compelled to close mining operations during strikes and other unavoidable casualties over which the lessee had no control. The use of the words "other unavoidable casualties over which the lessee has no control" after the word "strikes" indicates that the words "unavoidable casualties" were not used in a broader sense than strikes but embraced only such casualties as were of a like nature to strikes and that the casualties must be such as were due to outside forces or to the conduct of a third party over which the lessee had no control. The lessee can not claim deductions for suspensions of operations on account of the bad condition of the coal market and his inability to sell coal, a shutdown occasioned by the installation of an electric plant, a wreck on the incline, freezing of the powerhouse pipe line, delay in getting engine oil ordered in ample time but not delivered, the breaking down of a drum shoe, the alterations of screens, breaking down of the engine, breaking down of the hoisting engine, as these matters were all under the control of the lessee. The failure of a railroad company to furnish cars is an unavoidable casualty within the meaning of the lease where it appears that the lessee used reasonable diligence to procure the necessary cars.

Bennett v. Howard (Kentucky), 195 Southwestern 117, p. 118.

RECOVERY OF ROYALTIES—DEDUCTIONS.

In an action by a lessor to recover a stated annual minimum royalty in a lease providing for the same, but providing also that there should be a proportionate deduction for any time that the operations of the lessee were suspended because of strikes or unavoidable casualties, an answer by the lessee is not sufficient which states that the mining operations were suspended because of inability to get cars because of the refusal of a railroad company to furnish cars in the absence of an allegation that the lessee requested cars in time to have the railroad company furnish them when needed.

Bennett v. Howard (Kentucky), 195 Southwestern 117, p. 118.

WAIVING LIABILITY FOR DAMAGES—RECOVERY OF ROYALTY.

A coal-mining lease provided for the annual payment of a certain stipulated sum and provided also that the failure to comply with certain conditions as to mining should not render the lessee liable to any damages further than the forfeiture of the lease. An action on the lease to recover an overdue annual payment is not an action for damages, but is strictly an action on the contract based upon the express agreement to pay.

Saylor Park Land Co. v. Glenwood Coal Co. (Iowa), 162 Northwestern 203.

BURDEN OF PROOF AS TO PRESENCE OF COAL—TERMINATION OF LEASE.

A coal-mining lease required the lessee to pay an annual minimum royalty of \$1,000, the first payment to be made three years after the date of the lease. Prior to the execution of the lease the lessee, with the consent of the lessor, had prospected upon the leased land, drilled holes thereon and on the adjoining land, and at the time of the execution of the lease had blue prints of the prospecting and drilling, and entered into the lease without demanding further opportunity for investigating. The lessee made no effort to discover coal upon the leased land, but in driving entries on the adjoining land toward the leased land "slate" and rock were struck which made the further driving of the entry impossible. The lease clearly indicates that the parties intended that a failure to find coal should not defer the payment of the minimum royalty for more than three years. The lease in effect is an agreement that in consideration of being permitted the possession of the premises for 20 years, the stated term, the lessee will, after three years, pay the minimum royalty and take the risk of being able to prove that merchantable coal can not be found by the time the duty to pay the royalty accrues. Under

such conditions the lessor is not required to prove the presence of minable and merchantable coal in the land. The lessee may terminate the lease and with it the obligation to pay the minimum royalty by proving a failure of consideration in that actual mining has demonstrated that merchantable coal is not to be had.

Bowland v. Anderson Coal Co. (Iowa), 162 Northwestern 321.

LIABILITY OF LESSOR FOR NEGLIGENCE OF LESSEE.

An owner and lessor of a coal mine can not, in the absence of some provisions in the lease to that effect, be held liable in damages for injuries sustained by an employee of the lessee where such injuries were occasioned by the negligence of the lessee.

Stearns Coal & Lumber Co. v. Spradlin (Kentucky), 195 Southwestern 781, p. 782.

OIL AND GAS LEASES.

CONSTRUCTION—INTEREST RELATING TO REAL ESTATE.

An oil and gas mining lease, whether a chattel real, an incorporeal hereditament, or whatever term, is a right or interest relating to real estate, and while it does not rise to the dignity of an estate prior to entry by a lessee, yet it is property and as such is subject to transfer and sale.

Shaffer v. Marks, 241 Federal 139, p. 142.

CONSTRUCTION—KNOWLEDGE AND INTENTION OF PARTIES.

In the construction of an oil and gas lease the courts must assume that when the parties executed the lease they did so with knowledge of the construction placed upon such contracts by the highest court of the State. The court must also assume in the construction of such a lease that the parties knew of the vagrant and fugitive character of oil in place.

Lynch v. Davis (West Virginia), 92 Southeastern 427, p. 429.

PRACTICAL CONSTRUCTION—ADOPTION BY COURT.

In the construction of an ambiguous oil and gas lease a court, in order to ascertain the intention of the parties, will consider the interpretation placed upon the lease by the parties themselves and will look also to their actions thereunder before any controversy arose between them as to its meaning. And such construction, when reasonable, will be adopted and enforced by a court and the construction placed thereon by the parties will prevail if the language will reasonably allow of such construction, although the court would probably adopt a different one but for the particular construction already placed by the parties on their agreement.

Bearman v. Dux Oil & Gas Co. (Oklahoma), 166 Pacific 199, p. 201.

CONSTRUCTION—APPLICATION OF PAYMENTS.

An oil and gas lease provided that the lessee should complete a well on the leased premises within three months of its date or pay at the rate of \$20 for each additional three months the completion was delayed. But the lease was silent as to the time at which such rentals should be paid. The lease also contained a provision whereby in consideration of \$1 the lessor waived his right to declare a cancellation or forfeiture thereof, except for the nonpayment of rentals when due. It also contained a further provision which authorized the lessee at any time on the payment of \$1 to surrender the lease for cancellation and thereupon all payments and liabilities thereafter to accrue should cease. At the time the lease was executed it was agreed that the rentals as provided should be due and payable in advance, and pursuant to this arrangement or agreement rentals were for a time paid in advance of the three months' period for which they were due. In an action involving the rights of the lessee the lease must be construed, in the light of the action of the parties as requiring the rentals due thereunder to be paid in advance, and if not paid for the term for which they are due, the lessor may, under the forfeiture clause, declare a forfeiture of the lease for the nonpayment of rentals when due and on such declaration by the lessor all rights of the lessee are to terminate, and he can not thereafter have specific performance of the lease either directly or indirectly by means of an injunction enjoining the lessor from interfering with his explorations for oil and gas.

Bearman v. Dux Oil & Gas Co. (Oklahoma), 166 Pacific 199, p. 201.

OPTIONAL LEASE—CONSTRUCTION.

The rule of construction as applied to oil and gas leases in Oklahoma is that where contracts are optional in respect to one party they are strictly construed in favor of the party that is bound and against the party that is not bound.

Bearman v. Dux Oil & Gas Co. (Oklahoma), 166 Pacific 199, p. 200.

CONSTRUCTION—MEASUREMENT OF GAS.

An oil and gas lease provided that the lessee was to deliver to the lessor one-sixth of the oil found and that any gas found should be measured by a meter at the well; that if more than one well was drilled all the gas should be connected in one system of pipes and a meter or measuring station installed on the premises and the lessor should receive as royalty for the gas sold $2\frac{1}{2}$ cents per 1,000 cubic feet. This lease means that a meter should be put upon the land and the gas passed through it from the well or wells and that the

gas should be paid for at the stipulated price according to the readings of the meter.

Noble v. W. Pennsylvania Natural Gas Co. (Pennsylvania), 100 Atlantic 480.

NATURE AND EFFECT—RIGHT TO PROSPECT.

An oil and gas lease does not vest in the lessee the title to the oil and gas in the leased lands and is not a grant of any estate therein; but it is a grant of a right to prospect for oil and gas, and is an incorporeal hereditament.

Shaffer v. Marks, 241 Federal 139, p. 142.

PAROL PROOF TO AID CONSTRUCTION.

In the construction of an oil and gas lease it is the duty of a court to place itself as far as possible in the situation of the parties at the time their minds met upon the terms of the agreement and from a consideration of the writing itself ascertain their intention; but if this can not be done from the instrument itself the circumstances under which it was made and the subject matter to which it relates may be proved and considered and with these aids, it is the duty of a court to so interpret the lease as to give effect to the mutual intention of the parties as it existed at the time of the contract so far as that intention is ascertainable and lawful.

Bearman v. Dux Oil & Gas Co. (Oklahoma), 166 Pacific 199, p. 201.

JOINT LEASE—RIGHTS OF LESSORS.

The several owners of adjoining tracts of land united in a single lease thereof to a third person for oil and gas purposes. The lands were described in the lease as a single tract and provision was made for the delivery of one-eighth of the oil produced to the lessors. Under such a lease the royalty oil delivered by the lessee must be divided among the lessors in the proportion as the area of the tract of land owned by each of them bears to the total area of the tract covered by the lease, regardless of the ownership of the tract or tracts of land upon which wells were drilled from which the oil was produced.

Lynch v. Davis (West Virginia), 92 Southeastern 427, p. 428.

Wettengel v. Gornley, 160 Pennsylvania 559, 28 Atlantic 934, 40 Am St. 733.

Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 41 Pacific 1087.

JOINT LEASE OF SEVERAL TRACTS—RIGHT OF OWNERS TO RE-LEASE.

The several owners of contiguous tracts executed a single oil lease and described the premises as a single tract of 600 acres. The lessee drilled a well on one of the tracts but none on the others.

The drilling of a well on one of the tracts of land was a sufficient compliance with the requirements of the lease to preserve the rights of the lessee as to all of the tracts and the owners of the tracts not drilled upon had no right to re-lease their tracts to other parties for drilling purposes and the original lessee could maintain a suit to cancel such subsequent leases.

Lynch v. Davis (West Virginia), 92 Southeastern 427, p. 429.

PERFORMANCE BY LESSEE — VESTED RIGHT.

Under a joint lease executed by several separate owners of different but contiguous tracts of land, described as a single tract containing a stated number of acres, the drilling of a well upon one of the several tracts, in accordance with the terms of the lease is sufficient performance on the part of the lessee to keep alive his rights under the lease as to the land of all of the lessors. It is wholly immaterial as to the lessee's right that because of the vagrant and fugitive character of oil, the whole thereof may be extracted through a well located upon one of the tracts and the lands of the other lessors entirely devastated of the oil underlying the same without any compensation from the lessee other than as provided by the terms of the lease.

Lynch v. Davis (West Virginia), 92 Southeastern 427, p. 429.

JOINT LEASE — RIGHT OF LESSEE.

A joint lease by which separate owners leased their lands described as a single tract gives the lessee the right to explore for oil upon any or all of such tracts of land, and by the production of oil upon any one of such tracts there is vested in the lessee the right to remove the oil from all the tracts whether by means of a well, or wells, drilled upon one of them, or more than one of them. After the oil is produced the royalties, or the royalty oil, should be delivered to the lessors and divided among them in the proportion that the parcel of land held by each of them bears to the total area of the land.

Lynch v. Davis (West Virginia), 92 Southeastern 427, p. 429.

RIGHTS OF LESSEE — VESTED RIGHTS.

An oil lessee acquires a vested right to enter and explore for oil and gas and appropriate the same according to the terms of the contract, and this vested right is as much entitled to the protection of a court of equity as a fee simple estate in land and in a proper case, irrespective of such remedy the State courts afford, Federal equity will apply its own remedy.

Shaffer v. Marks, 241 Federal 139, p. 155.

POSSESSION BY LESSEE—PRESUMPTION.

A lessee of an oil and gas lease may be required to pay rent so long as he holds possession, although the lease by its terms may be at an end; but the execution of an oil and gas lease creates no presumption of subsequent possession by the lessee.

Ash Grove Lime & Portland Cement Co. v. Chanute Brick & Tile Co. (Kansas), 164 Pacific 1087, p. 1088.

COMMENCEMENT TO DRILL—WHAT CONSTITUTES.

An oil and gas lease provided that if the lessor should sell the leased land before the lessee commenced drilling operations the lease should terminate. The driving of a stake to indicate the location of a well and the driving of another stake locating a place to set a boiler to drive a drilling machine on the part of the lessee do not constitute a commencement of operations to drill within the provisions of the lease.

Henning v. Wichita Natural Gas Co. (Kansas), 164 Pacific 297, p. 298.

CONSIDERATION—DEVELOPMENT.

In the matter of the execution by a landowner of an ordinary oil and gas lease on shares, exploration and development constitute the paramount or controlling consideration therefor.

Advance Oil Co. v. Hunt (Indiana App.), 116 Northeastern 340, p. 342.

DEVELOPMENT—DUTY TO DRILL ADDITIONAL WELLS.

The number and location of oil wells requisite to the performance of the covenant to develop on the part of the lessee, depends upon the character of the leased lands. The area of the lands does not determine the number and their relation to one another and is not governed by any fixed rule. Whether, after the discovery of oil or gas by means of the initial or experimental well, there is a duty to sink additional wells depends upon the probability arising from the circumstances surrounding the property, that an additional well or wells will be profitable to the lessee. The lessee in an oil lease is under no duty to operate at a loss to himself in order to make the premises profitable to the lessor, but it is only under circumstances indicative of mutual profit of a profit to the lessee as well as to the lessor that the duty to develop devolves.

Steele v. American Oil Dev. Co. (West Virginia), 92 Southeastern 410, p. 413.

IMPLIED COVENANT TO DEVELOP—BURDEN OF PROOF.

A lessor in an oil and gas lease in an action against the lessee for damages for an unreasonable or arbitrary evasion of implied covenants to develop, where gas or oil has been found in paying quantities,

assumes the burden of showing and by clear and convincing proof must, to recover, show, by witnesses having experience and skill and engaged in similar operations that the lessee, with due regard for the advantage and profit to himself and lessor, has not, surrounding circumstances and conditions being considered, exercised ordinary diligence in conducting the drilling operations. If the lessee has so developed the leased premises the lessor can not recover.

Steele v. American Oil Dev. Co. (West Virginia), 92 Southeastern 410, p. 413.

IMPLIED COVENANT TO DEVELOP—DAMAGES FOR FAILURE TO DRILL—PROOF.

The obligation of a lessee of an implied covenant in an oil and gas lease does not require the lessee to drill wells wherever there is a reasonable expectation that some oil may be found; but it must appear that there is a reasonable expectation that the results to the lessee from the oil that will be produced from the drilling will at least compensate him for the expenses incurred in drilling the well and producing the oil. This can not be left to conjecture but must have for its basis some substantial proof. Thus it could be shown what would be the cost of drilling a well from the peculiar sands in which oil was found on adjacent lands, what would be the proximate cost of producing and marketing the oil therefrom; what the production was from wells drilled in close proximity to the leased lands, as it could be reasonably assumed that if wells in close proximity produced paying oil, that a well drilled upon the leased lands would be likewise. The fact that wells drilled in close proximity proved to be dry would be a material consideration as well as the fact that productive wells were so drilled. In such a case it must be shown the extent to which a well or wells pumped and worked as the wells on lands adjoining the leased lands were pumped and worked would drain the oil from the leased lands. Experienced oil men can give reasonable data or information from which it can be determined with reasonable certainty that wells operated on adjoining lands were draining oil from the leased premises and the extent thereof. In the absence of such evidence neither a court nor a jury can determine with any degree of accuracy the amount of oil drained from the leased premises and the amount of damages that the suing lessor would be entitled to recover.

Steele v. American Oil Dev. Co. (West Virginia), 92 Southeastern 410, p. 412.

FAILURE TO DEVELOP—PROOF ENTITLING LESSOR TO DAMAGES.

In an action by a lessor against a lessee for damages for failure to develop the leased premises under an implied covenant, the lessor must show by proper proof certain circumstances and conditions, such as the situation of the parties; the character of the mineral

products: the nature of the oil-bearing sands, whether dense, soft or porous; development on contiguous lands, whether by same or different operators; cost of drilling; proximity to market and facilities for marketing; current prices, whether high or low; location of land and such other conditions attendant upon the operations as may explain the necessity for promptness or excuse for delaying action in prosecuting such development. If considering these, the lessee has exercised that reasonable diligence and sound, practical judgment, common to and exercised by operators of ordinary prudence and experience in the same business under the same or similar circumstances or conditions, then the lessee has performed his full duty under the lease and the lessor can not recover.

Steele v. American Oil Development Co. (West Virginia), 92 Southeastern 410, p. 413.

FAILURE TO DRILL OFFSET WELLS—INSUFFICIENT PROOF TO SUSTAIN RECOVERY.

In an action by a lessor against a lessee in an oil and gas lease for damages for the drainage of oil from the leased premises by reason of wells on adjoining lands and because of the lessee's failure to drill offset wells, a verdict for \$12,000 in damages can not be sustained where in the judgment of three witnesses who had done some drilling in the particular oil field that an offset well should have been driven but where they gave no facts upon which they based their conclusion and did not indicate the extent to which the oil in the leased lands was affected by the drilling of the wells on adjoining lands. There was no proof indicating what expenditure would be required for the drilling of an offset well on the leased land and no witness testified that there was a reasonable probability that such a well, if drilled, would be profitable to the lessee. No witness testified as to what would be the probable production from such a well from the standpoint of consideration of all the surroundings. The lessor testified that in his opinion he was damaged \$12,000, but how he arrives at the conclusion he did not say. The evidence shows that there had been three wells drilled upon the leased premises and the total royalties received by the lessor to the institution of the suit was less than \$2,500, and it must be highly conjectural and imaginative to assume that there is any reasonable basis for a verdict that the lessor's damages would amount to \$12,000 for failure to drill the offset wells when the total royalties received by him from the three properly located wells was about one-fifth of that sum.

Steele v. American Oil Development Co. (West Virginia) 92 Southeastern 410, p. 414.

CONSTRUCTION — DEVELOPMENT — OFFSET WELLS.

The practically universal interpretation of oil and gas leases is that where the contract does not expressly state what shall be done by the lessee there lies the legal implication that if he finds oil and gas or if they are found on adjoining lands, he will drill as many wells as will offer sufficient protection against drainage, and so otherwise develop the leased lands as to serve the mutual benefit of lessor and lessee. The necessity for such interpretation is based on the illusive and migratory nature of oil and gas, their disposition to travel and to find vent through the most readily accessible opening. The lessee though experienced as against the lessor can not fraudulently exercise his judgment solely to promote his individual interest, ignoring the interests of the lessor, but to serve him, his judgment must conform to that generally exercised by other operators in similar circumstances and conditions and in view of the intention of the parties when entering into the lease.

Steele v. American Oil Development Co. (West Virginia) 92 Southeastern 410, p. 413.

FAILURE TO DEVELOP — RECOVERY OF DAMAGES — PARTIES.

A lessor in an oil and gas lease may maintain a suit in trespass on a case against the lessee to recover damages for injuries sustained by him because of the failure of the lessee to drill offset wells necessary to save the oil and gas in the leased lands and to prevent it from being drained by wells drilled on adjacent lands. The damages sought in such an action is for diminution of the royalties by reason of such drainage, and all the lessors in the lease must join as plaintiff.

Steele v. American Oil Development Co. (West Virginia), 92 Southeastern 410, p. 411.

FAILURE TO DRILL OFFSET WELLS — RECOVERY AGAINST ASSIGNEE —
PROOF OF DAMAGES.

In order for a lessor to recover damages from a lessee in an oil and gas lease because of a failure to drill offset wells to prevent the drainage of the oil in the leased lands by wells drilled on adjacent lands, it must appear from the evidence that it is reasonably certain that the oil from the lessor's land has been, or is being, drained by the wells drilled on the adjacent land. It is not possible to prove this with absolute certainty, but it is not impossible, nor is it difficult to prove such circumstances as would reasonably lead to the conclusion that such was the fact. Thus it would be easy to show the character of the sand in which the oil was found on the adjoining land and that wells had been drilled on the adjoining lands, their distance from the

land, and the amount of oil produced therefrom. It could also be shown what area would probably be drained of oil by the wells drilled in the particular sand in which the wells were drilled on the adjoining land, and if such area so probably drained included a part of the leased lands it could then be reasonably assumed that the wells on the adjoining lands were draining oil from the leased lands.

Steele v. American Oil Development Co. (West Virginia), 92 Southeastern 410, p. 412.

ACTION AGAINST ASSIGNEE FOR FAILURE TO DEVELOP.

Where a lessor in an oil and gas lease brings an action against an assignee of the lessee to recover damages for failure to drill wells upon the leased lands in order to prevent drainage of the oil in such leased lands through wells drilled upon adjacent land, it is necessary for the lessor to prove the assignment and transfer of the lease to the assignee, the defendant in the suit, and that the assignee's operations on the lessor's land were under and by virtue of the lease, as the action being based upon a breach of an implied covenant to develop, it can not be maintained against any person not a party to the lease.

Steele v. American Oil Development Co. (West Virginia), 92 Southeastern 410, p. 412.

RIGHTS OF LESSEE AS AGAINST SUBSEQUENT LESSEE.

An ordinary oil and gas lease giving the lessee a right to prospect and explore for oil and gas gives the lessee no estate in the oil and gas in the premises described. But the lessee in such a lease is entitled to protection in his right to explore the premises for oil and gas, and he is entitled to an injunction restraining subsequent lessees of the same premises from destroying this right.

Downey v. Gooch, 240 Fed. 527, p. 529.

RIGHT OF LESSEE TO EQUITABLE RELIEF.

An oil and gas lease required the lessee to commence operations within 45 days and to drill to a depth of 2,800 feet unless oil or gas was found in paying quantities at a less depth and to complete a well within four months. The lessor subsequently gave the lessee an extension of six months within which to commence operations. The lessee began operations and was proceeding in the utmost good faith and with reasonable diligence to explore the premises for oil and gas, but there was no great necessity for immediate development to prevent drainage by other wells. Under such circumstances the lease is not inequitable and does not deprive the lessee of the right to prevent subsequent lessees from drilling on the property.

Downey v. Gooch, 240 Fed. 527, p. 531.

ASSIGNEE BOUND BY CONTRACT TO SELL.

A purchaser of an oil and gas lease with knowledge that his vendor, the lessee, had entered into a contract by which he agreed to sell and deliver to a certain pipe-line company, at a stated price per barrel, all of the oil produced from a certain-numbered well on the leased premises, is bound by the terms of such contract and is liable in damages for a failure to so deliver the oil as required by the contract.

Sims v. Southern Pipe Line Co. (Texas Civil App.), 195 Southwestern 283, p. 288.

SUIT BY ASSIGNEE TO ENFORCE—JURISDICTION OF FEDERAL COURT.

An action in equity by the assignee of an oil and gas grant or lease to restrain others from operating the land for oil and gas is not a suit to recover upon a chose in action by an assignee within the provisions of the judicial code (act Mar. 3, 1911, 36 Stat. 1091), prohibiting Federal district courts from entertaining suits to recover upon any promissory note or other chose in action in favor of an assignee.

Shaffer v. Marks, 241 Fed. 139, p. 143.

FAILURE TO PAY RENT—RELIEF IN EQUITY.

A lessee in an oil and gas lease who intentionally fails to make a delay or rental payment at the time and in the manner specified in the lease can not escape the forfeiture of the lease by tendering payment after the stated time. But where it is his intention to make the stipulated payment in strict accordance with the terms of the lease, but his failure to do so is because of some accident or mistake not the result of his willful negligence or gross neglect, a court of equity may grant him relief as against a forfeiture asserted by the lessor, where the lessor has not suffered in any way by the delay and it would be inequitable to enforce the forfeiture.

Shaffer v. Marks, 241 Fed. 139, p. 159.

MEASUREMENT OF GAS—BASIS FOR ROYALTIES.

An oil and gas lease gave the lessor a royalty of 2½ cents per 1,000 cubic feet of all gas produced under the lease. By the terms of the lease the gas was to be measured by a meter or measuring station installed on the premises and the gas paid for according to the reading of the meter. Wells were drilled producing gas, the pipe lines connected, and a measuring station and a meter installed as provided and the lessee at regular intervals paid the lessor for the gas at the stipulated price as recorded by the meter. It is a known fact that more particles or atoms of gas will pass through a meter at a high pressure than at a low pressure but the reading of the meter

will be the same in each case. In the instant case the lessee equipped the line with a pressure gage that would indicate the pressure of the gas passing through the pipes at various intervals. But under the plain terms of the contract the lessor was not entitled, by a suit in equity, to compel the lessee to make known to him the pressure of the gas at various times so that by means of certain mathematical tables and calculations it could be ascertained how many cubic feet of gas passed through the meter at a definite pressure. In the absence of a custom, or in the absence of an express agreement as to the pressure at which the measurement should be made, a lease of such character must mean that the gas is to be measured at line pressure, that is, the varying pressure of the gas in the line from time to time, and that the lessor could not compel the lessee to disclose to him the readings of the pressure gage and he had no right to recover anything beyond the meter measurement at the stated rate.

Noble v. W. Pennsylvania Natural Gas Co. (Pennsylvania), 100 Atlantic 480.

TERMINATION OF LEASE—EXTENSION OF TIME.

An oil and gas lease granted to the lessee the exclusive right for a period of three years to enter upon, operate, and procure oil and gas upon the lands described. The lease provided that if oil or gas be found all rights and obligations secured shall continue so long as either can be procured in paying quantities, but in case no well for oil or gas be drilled upon the premises within the three years all rights and obligations should cease. The lessee drilled no wells upon the lease premises within the stated period of three years. After the termination of the three-year period the lessor sold the land and by the terms of the deed made the conveyance subject to the oil and gas lease. The fact that the deed was made subject to the lease could not have the effect of extending the life of the lease. In an action for rent by the grantee of the lessor the burden was upon him to prove that the lessee had discovered oil or gas in paying quantities in order to prolong the life of the lease.

Ash Grove Lime & Portland Cement Co. v. Chanute Brick & Tile Co. (Kansas), 164 Pacific 1087, p. 1088.

STATUTORY PROVISION FOR CONTINUANCE.

The statute of Kansas (Gen. Stats. 1915, sec. 4993) provides that the record of an oil and gas lease shall impart notice of its continuance only for the definite period therein expressed, unless an affidavit is filed with the register of deeds showing the happening of the contingency effecting an extension of the time of the lease.

Ash Grove Lime & Portland Cement Co. v. Chanute Brick & Tile Co. (Kansas), 164 Pacific 1087, p. 1088.

CANCELLATION.

Where an oil and gas lease contains a surrender clause by which the lessee may surrender the lease at any time, the lessor does not have the right to decline to accept rentals made in accordance with the terms of the lease and cancel the lease within the five year term, where it does not appear that there was any threatened drainage of the land or any undue delay in the development after becoming practical from the standpoint of marketing facilities.

Shaffer v. Marks, 241 Fed. 139, p. 143.

AGREEMENT TO CANCEL—VALIDITY AND EFFECT.

An oil and gas lease provided that if the lessor made a bona fide sale of the leased land before the lessee commenced operations to drill thereon and the lessor then refund to the lessee all money paid by the latter to the former then the lessee was to cancel the lease. This agreement was held to be binding on the lessee where, after certain litigation between the parties had arisen and the lessor had been defeated, he made a bona fide sale of the land before the lessee commenced operations to drill.

Henning v. Wichita Natural Gas Co. (Kansas), 164 Pacific 297, p. 298.

FAILURE TO RELEASE OF RECORD.

The statute of Kansas (Gen. Stats. 1915, sec. 4992) imposes upon the lessee the duty of discharging the lease in case it has become forfeited, but the statute does not apply to a lease which has expired by operation of time but which might have been extended by certain conditions if they had arisen.

Ash Grove Lime & Portland Cement Co. v. Chanute Brick & Tile Co. (Kansas), 164 Pacific 1087, p. 1088.

ABANDONMENT—LIABILITY FOR DAMAGES.

An oil and gas lease for a large tract of land provided that in consideration of a cash payment by the lessee and a promise to pay royalty on all oil found the lessee undertook to develop the land for oil and gas and other minerals and sunk a well thereon and then ceased operations. The lessee had the right to abandon any part of the leased premises and should thereupon execute a release for any abandoned part to the lessor. The fact that the lessee abandoned the premises after drilling one well, and that he had in fact discovered oil in some quantity and purposely concealed such discovery from the lessor and maliciously packed and plugged the well and falsely reported that no oil had been found, does not give the lessor a right of action for damages where the evidence fails to show that he was

deprived of any part of his land or of any oil or gas or other mineral therein, and that by reason of the false statement he was not deprived of any opportunity to sell the land advantageously, and where the evidence fails to show that he was otherwise damaged.

Arnold v. Producers' Oil Co. (Texas Civil App.), 196 Southwestern 735, p. 736.

ABANDONMENT—INJUNCTIVE RELIEF.

A lessee of an oil and gas lease who agreed to complete a well on the premises within three months from its date or pay a stipulated rental for each additional three months such completion was delayed and until a well was completed and who, upon drilling one well that proved to be a dry hole, thereupon removed the drilling machinery upon adjoining lands, leased from other persons, and drilled producing oil and gas wells and made no effort and showed no disposition or intention to develop the leased lands, can not enjoin the landowner from re-leasing the land to other persons and enjoin such other lessees from drilling on the land where it appears that at the date of the notice of forfeiture three oil wells were located within 250 feet of the line of the leased premises that were being pumped and operated for oil and that there were two gas wells within 200 feet of the line of the leased land.

Advance Oil Co. v. Hunt (Indiana App.), 116 Northeastern 340, p. 343.

FORFEITURE CLAUSE—AVAILABILITY.

The lessor in an oil and gas lease containing a clause giving the right of forfeiture on nonpayment of rentals when due declared a forfeiture for such nonpayment of rentals and thereafter executed to another person another lease upon the same premises. The latter lease contained a surrender clause authorizing the lessee therein to surrender the same. Under such circumstances the lessee in the first lease, after its forfeiture in an action by him to enjoin the lessor from interfering with his right to continue development operations, can not take advantage of the surrender clause in the second lease authorizing its surrender.

Bearman v. Dux Oil & Gas Co. (Oklahoma), 166 Pacific 199, p. 203.

RENTAL AND FORFEITURE.

An "unless" lease does by its term become null and void when the lessee intentionally fails to make the payment at the time and in the manner stipulated. In the case of an "or" surrender clause lease, the lessor can elect as to whether he will cancel and terminate the lease for nonpayment or treat it as continuing in force and collect the stipulated rental. An intentional failure to pay as stipulated, in every case, may be treated as an abandonment of the lease.

Shaffer v. Marks, 241 Fed. 139, p. 158.

SURRENDER CLAUSE—CONSTRUCTION.

The surrender clause in oil and gas mining leases will be strictly construed in favor of the landowner, the party who is bound, and against the lessee, the party not bound.

Shaffer v. Marks, 241 Fed. 139, p. 153.

CONSTRUCTION—EFFECT OF SURRENDER CLAUSE.

An oil and gas lease contained a clause giving the lessee the right to surrender the lease at any time, but provided that the right to surrender should cease and become inoperative upon the institution of any suit by the lessee to enforce any rights under the lease. Such a clause does not prevent a court from enforcing specific performance of the lease at a suit by the lessee, for the reason that the institution of the suit renders the surrender clause ineffective, and the lease is no longer a unilateral contract.

Downey v. Gooch, 240 Fed. 527, p. 529.

AGREEMENT TO SURRENDER—RIGHT TO SURRENDER—VALIDITY.

The Oklahoma courts have not decided that an Oklahoma oil and gas lease reserving to the lessee the right to surrender the lease at any time upon the payment of \$1 to the lessor is void, but such leases have been treated as valid, binding contracts, and not conferring upon or reserving to the lessor the right to decline to accept rents for delayed drilling when properly attended.

Shaffer v. Marks, 241 Fed. 139, p. 145.

RIGHT TO SURRENDER—PRESUMPTION.

An oil and gas lease was to run as long as either oil or gas was found in paying quantities. By its terms the lessee was to complete one well within three years, unless there should be unavoidable delay or accident. The lease provided that the lessee should have the right at any time to surrender the lease. The purpose of the lessor was to have his land explored for oil and gas, and while there was no express obligation on the part of the lessee so to do, yet this obligation arises by necessary implication. The inducement to the lessor was that he was to have one-eighth of all the oil produced. After a long delay in drilling operations and a discovery and a large production of oil, the lessee is not permitted to take advantage of this wrong in delaying operations and deny the right of the lessor or of his heirs to recover the royalties on the ground that the lease was abandoned by this delay in developing the land.

Andrews v. Andrews (Pennsylvania), 100 Atlantic 521, p. 522.

RIGHT OF SURRENDER—LACK OF MUTUALITY.

An oil and gas lease provided that the lessee was to complete a well within three months from its date or pay a stipulated rental until a well should be completed. The lease gave the lessee the right at any time on the payment of \$1 to surrender the lease for cancellation and thereafter all payments and liabilities should cease and terminate. Such a lease or contract is wanting in mutuality because for a nominal sum the lessee is given the right to annul it at any time and end all liability thereafter accruing under the lease. The lessee of such a lease can not enforce its terms by injunction as courts refuse to grant equitable relief where, if granted, one of the parties may nullify the action so taken by the exercise of a discretionary right which either the law or his contract has conferred upon him.

Advance Oil Co. v. Hunt (Indiana App.), 116 Northeastern 340, p. 343.

CASH BONUS—SURRENDER.

A cash bonus of \$120 in an oil and gas lease supports each and every provision in the lease and the lease being an indivisible contract the cash bonus not only supports the full term of the lease, but the option of the lessee to keep the lease alive by tendering delay rentals.

Shaffer v. Marks, 241 Fed. 139, p. 155.

INJUNCTION TO PREVENT VIOLATION OF LEASE.

An injunction may issue in a proper case to prevent the violation of a lease, where the remedy at law is not plain, practical, and efficient to secure the ends of justice as the equitable remedy of injunction. But equity will not intervene to prevent the invasion of a right where such invasion would only entitle the complainant to nominal damages, or in cases where it is doubtful or a matter of speculation as to whether any damages will result to the complaining parties. On this rule a lessee of an oil and gas lease who takes no immediate steps to develop the leased premises on notice from the lessor that producing oil wells have been drilled and are being operated on adjoining lands within 300 feet of the line of the leased premises can not by injunction prevent the lessor from releasing the premises and can not by injunction prevent the second lessee from drilling for oil upon the premises.

Advance Oil Co. v. Hunt (Indiana App.), 116 Northeastern 340, p. 343.

MINING PROPERTIES.

TAXATION.

CORPORATION EXCISE TAX LAW—INCOME.

There is no presumption that Congress by the act of August 5, 1909 (36 Stat., 112), changed its idea of what the word "income" means. It must be assumed that the word "income" in this law means the same thing as it does in income tax laws. It was natural for Congress to decide that the tax which it was to impose upon the privilege should be measured either by the amount of business done thereunder or by the proved value of the privilege, as either would be a logical basis for such taxation. If the former had been the adopted theory, the tax would have been measured by the total receipts or by the total sales, or by some combination of these measures, and any thought of profits would be foreign to the scheme of measures. But this theory was not adopted. On the contrary, all ordinary expenses and losses in the conduct of the business were expressly to be deducted and only the remainder to be taxed. Whether this remainder be called net income or net profits is of no consequence, as by either name it is the same thing. It is of the essence of the law that the corporation doing a business of \$100,000 and making \$50,000 profit is to be taxed at 1 per cent upon that profit, less the exemption of \$450, while a corporation doing a business of \$10,000,000 and making no profit at all is not to be taxed. It is clear to a demonstration that Congress deliberately intended to tax the franchise according to its actual value to the user as determined by the annual profit derived therefrom without regard to its value as indicated by the amount of business done.

Biwabik Mining Co. v. United States, 242 Fed. 9, p. 14.

BASIS FOR CORPORATION EXCISE TAX.

The act of Congress of August 5, 1909 (36 Stat., 112), known as the corporation excise tax, does not provide for a tax upon income, or what the tax upon income shall be. The statutory computation rests upon the assumption that it is well known what income is as distinguished from other matters, as otherwise it would be impossible to state the gross income which is the foundation of such statutory computation.

Biwabik Mining Co. v. United States, 242 Fed. 9, p. 14.

GAINS DERIVED FROM MINING.

A mining corporation engaged in mining operations is not merely occupied in converting its capital assets from one form to another, and while a sale outright of its mining property might be fairly described as a conversion of the capital from land into money, the process of mining is in a sense equivalent to a manufacturing process, and however the operation may be described the transaction is undoubtedly business within the meaning of the corporation tax law, and the gains derived from such business are properly the income from business derived from capital, from labor, or from both combined.

Baumbach v. Sargent Land Co., 242 U. S. 503, p. 521.

INDEPENDENT REVENUE FROM MINING PROPERTY.

Under the constitution of Utah (art. 13, sec. 4) requiring the taxation of mining property and surface improvements that have a value separate and independent of the mine, the fact that the owner of a mine may derive some revenue or other benefit from some part of the property used in connection with and as a part of a mine is not conclusive upon the question as to whether it is assessable for taxation as separate and independent property.

Ontario Silver Mining Co. v. Hixon (Utah), 164 Pacific 498, p. 499.

PROPERTY OF INDEPENDENT VALUE.

Mining property, regardless of where it is situated, is not assessable under the constitution of Utah (art. 13, sec. 4) unless it has a value separate and independent from the mine.

Ontario Silver Mining Co. v. Hixon (Utah), 164 Pacific 498, p. 499.

SALE OR CONVERSION OF CAPITAL NOT TAXABLE.

For the purpose of taxation it may be assumed that the receipts and accumulations of a business corporation are of two characters—those which constitute its gross income and those which represent the sale or conversion of its capital. It is clear that the receipts and accumulations of a business corporation representing the sale or conversion of its capital do not constitute taxable income under the corporation excise tax of the act of Congress of August 5, 1909. (36 Stat. 112.)

Biwabik Mining Co. v. United States, 242 Fed. 9, p. 15.

ALLOWANCE FOR DEPRECIATION ON ORES MINED.

Under the corporation tax law of August 5, 1909 (36 Stat. 11), the ordinary depletion of a mine resulting from the mining and removal of ore in the ordinary mining operations can not be regarded as a

depreciation of the mining property for which a deduction may be made from the income or from the sales of ore made.

Baumbach v. Sargent Land Co., 242 U. S. 503, p. 523.

ASSESSMENT INCREASED—RELIEF—STATUTORY REMEDY.

A producing mine was duly assessed for taxes by the county assessor as provided by law. Subsequently the State board of equalization raised the total assessed valuation of the property of the county, and thereafter the county assessor, acting under authority, placed the additional assessment upon the mine in question. The mining company under such circumstances can not pay the amount of taxes under the original assessment and enjoin the sale of the property for the collection of the remainder. The statute itself provides a plain, speedy, and adequate remedy at law for the hearing or determining of such grievances as those of the mining company. It was the duty of the mining company to pay the whole of the tax and to proceed for relief under section 5750 of the Revised Statutes of 1908.

Kendrick v. A. Y. & Minnie Mining Co. (Colorado), 164 Pacific 1161.

POWER OF TAX COMMISSION TO REDUCE ASSESSMENT.

The statute of Minnesota (Gen. Stats. 1913, sec. 2344, subdiv. 5) confers upon the State tax commission the power to raise or lower the assessed valuation of property assessed for taxes, and under this statute the commission has the power, after a hearing, to reduce the valuation for taxation purposes of unmined ore contained in certain mines and the ore in stack piles.

State v. Lord (Minnesota), 162 Northwestern 675, p. 676.

COMMISSION'S REFUSAL TO REDUCE ASSESSMENT.

The refusal of the Minnesota State Tax Commission on a hearing to reduce an assessment on mining property, to order the mining company to produce its books showing the cost of mining and likewise its refusal to compel witnesses for the mining company to answer certain questions on the same subject, present no grounds for reversal on an appeal by the State from an order of the commission reducing an assessment for taxes on unmined ore and ore in stack piles.

State v. Lord (Minnesota), 162 Northwestern 675, p. 676.

VALUATION OF IRON MINE—SALE PRICE.

The statute of Michigan (Comp. Laws 1897, sec. 3850) provides that the cash value of property for the purpose of assessment means the usual selling price at the place where the property is situated, being the price which could be obtained therefor at a private sale

and not at a forced or auction sale. The statute also provides that the assessor in determining the value shall also consider the advantages and disadvantages of the location, the quantity in value of mines, minerals, quarries, or other valuable deposits known to be available. "The usual selling price" at the place where the property is, when assessed, no guide to an assessor in case the property is singular in character and is seldom, if ever, sold. But where none of the tests found in the legislative definition affords any aid in ascertaining the cash value of property, the property for that reason can not escape taxation and the legislative tests can not be the only one and can not be exclusive of others. Sales of mines are rarely made, and there is no market for the fee of iron mines and no usual selling price for them. It is not likely that a dozen similar sales would offer a reliable data for the valuation of an unsold iron mine. Where by approved methods the State had determined the value of a particular mine to be more than \$1,000,000, in which valuation the superintendent of the mine, a man of experience concurred, the fact that the mine was subsequently sold for \$600,000 cash is not alone sufficient to challenge the assessment made. The taxing officers could assume that in the sale as made the vendor and vendee, owing to their peculiar relation and with the use made of the ore had eliminated the factor of nonvisible ore, a factor that should be employed by the taxing officers in considering the valuable deposits available in the land.

Cleveland-Cliff Iron Co. v. Republic Township (Michigan), 163 Northwestern 90, p. 93.

VALUE OF ORE STIPULATED—TAXABLE INCOME.

Where an iron mine was stripped of the overlying surface and the mining done by simply quarrying and the quantity of ore can be measured with substantial accuracy, the selling price of ore mined and sold in any one year is not income within the meaning of the corporation excise tax act of August 5, 1909 (36 Stat. 112), especially where the price stipulated the extent and value of the ore in the ground on January 1 of the taxing year. Under such circumstances the mining is quarrying operations and involves no elements of uncertainty except those from contingencies which affect the value of all raw material, and the business more nearly proximates manufacturing than it does mining as this term is commonly understood.

Biwabik Mining Co. v. United States 242 Fed. 9, p. 15.

RECEIPTS FROM SALE OF LEASE—NOT TAXABLE INCOME.

The receipts from the sale of the entire interest in a lease by the lessee of a mine are receipts from the sale of capital assets and not from net income, and such receipts are not taxable under the corpo-

ration excise tax law of August 5, 1909 (36 Stat. 112), although they are subject to taxation under the income tax law.

Biwabik Mining Co. v. United States, 242 Fed. 9. p. 17.

DRAIN TUNNEL—NOT SUBJECT TO TAXATION.

The constitution of Utah (art. 13, sec. 4) requires that all mines and mining claims after purchase from the United States shall be taxed at the price paid therefor, unless the surface ground is used for other than mining purposes, and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent to such mines or mining claims, and all the net annual proceeds of all mines, shall be taxed. Under this statute a tax can not be levied upon drain tunnels, used for draining mines, which have no value separate and independent of the mine, although such tunnels were used by adjoining mine owners for a consideration paid to the owner, but which did not possess any value separate from and independent of the mine. It was not contemplated by this constitutional provision that any of the underground tunnels, drifts, or inclines of any mine which are used in connection with the mine and which are necessary to the successful operation of the mine should be taxed as separate and independent property.

Ontario Silver Mining Co. v. Hixon (Utah), 164 Pacific 498. p. 499.

TRESPASS.

INJURY TO MINE—LIABILITY OF SURFACE OWNERS.

The surface owners, though holding without liability for surface support, are liable where they purposely by the construction of ditches and drains turn the surface water into a subterranean coal mine, causing the entries and the mine to be filled with débris to the injury of mining operations. But in an action by the lessees of the mine for damages sustained by reason of the alleged wrongs the lessees of the mine can recover only for the damages accruing after they acquired their lease, and the burden is on them to prove the damages accruing after such time. Proof of the costs or expenses of removing the accumulated débris after the complainants acquired their lease is a proper and sufficient basis for the determination of the damages.

Sorg v. Frederick (Pennsylvania), 100 Atlantic 481. p. 482.

INJUNCTION TO PREVENT TRESPASS.

A person who without perfect and superior title in himself peacefully enters upon a part of a tract of oil land for the purpose of drilling, without the consent and against the will of another who is

in actual possession of such land under claim and color of title, is a mere trespasser, and he can not invoke the aid of a court of equity by injunction in his efforts to maintain his position on the land.

Williamson v. Wayland Oil & Gas Co. (West Virginia), 92 Southeastern 424.

WILLFUL TRESPASS—PUNITIVE DAMAGES.

The owners of the surface of land purposely and wrongfully constructed ditches and drains conducting the surface water into a pit hole and thereby conveyed the water and débris into a coal mine, obstructing the entries and damaging the mine. The lessees of the mine notified the surface owners of the damage being done and themselves obstructed the drains and ditches and turned the water away from the mine, but the surface owners successively reopened the ditches and caused the water and the débris to flow into the mine for a period extending over three years. In an action by the lessees for damages for the injuries sustained where there was evidence of the repeated and wrongful acts on the part of the surface owners, notwithstanding the protests of the lessees that their mine was being injured and its operation interfered with and on proof that the surface owners disregarded these protests and threatened the lessees and their employees with bodily harm if they attempted to close the openings and prevent the water from flowing into the mine, the court was justified in charging the jury that if the trespass was willful and malicious on the part of the surface owners they might allow punitive as well as actual damages.

Sorg v. Frederick (Pennsylvania), 100 Atlantic 481, p. 483.

LIENS.

LIEN AS CREATURE OF STATUTE.

A miner's lien is a creature of statute to which the miner must look for the right and authority to file any such lien.

Bishop v. Henry (Oregon), 165 Pacific 237, p. 239.

PROPERTY SUBJECT TO LIEN—PROOF OF RELIANCE.

Miners employed and working in a mine are given a lien on the property to secure the payment of their wages, and in enforcing their liens they are not required to prove that they relied upon their employer's supposed ownership of certain engines used in the mining operations, and the owner of such engines is estopped to deny his ownership as against the liens of the miners, where the engines were used in the mining operations as the property of the operating company.

Rogers v. Reynolds (Washington), 164 Pacific 80, p. 81.

PROPERTY COVERED BY LIEN—ESTOPPEL.

The owners of engines who permit them to be used in mining operations by a corporation in which they are interested and agrees that they may be mortgaged to secure a loan with which to pay mechanics' liens, but which mortgage was never executed, are estopped from setting up their ownership as against the liens of miners.

Rogers v. Reynolds (Washington), 164 Pacific 80, p. 81.

NATURE OF WORK.

The original lien law of Alaska (Comp. Laws Alaska, secs. 691-694) gave a lien to laborers performing labor upon the construction, development, alteration, or repair of any building, mine or other structure and made the person in charge of a mine the owner's agent. Miners' liens under this statute are limited to work done in the development or improvement of a mine.

Spaulding v. Martin, 241 Fed. 372, p. 375.

LIEN FOR LABOR—NATURE OF LABOR.

The labor mentioned in the statute of Oregon for miners' liens means actual physical labor unequivocally performed upon the property and does not apply to the services of a caretaker and the charges for board while the caretaker was absent from the property.

Stuart v. Camp Carson Min. & Power Co. (Oregon), 165 Pacific 354, p. 362.

SUFFICIENCY OF LIEN—NAME OF MINE OWNER UNKNOWN.

The statute of Oregon contemplates that in certain cases the name of the owner of a mining claim against which a miner has a lien may not be known, and in such event it is unnecessary that the notice of the lien contain the name of such owner.

Bishop v. Henry (Oregon), 165 Pacific 237, p. 239.

SUFFICIENCY—STATEMENT OF OWNER OF MINE.

The statute of Oregon (L. O. L., sec. 7445) requires that the miner's lien shall state the name of the owner or reputed owner of the mine or mining claim against which the lien is filed, if known, and also the name of the person by whom he was employed. This provision is complied with by the statement that a certain named person is the owner or reputed owner. A statement in the alternative that a designated person is the owner or reputed owner is also sufficient under the statute.

Bishop v. Henry (Oregon), 165 Pacific 237, p. 239.

SUFFICIENCY—CONTRACT RELATION.

Under the statute of Oregon it is unnecessary for the notice of a miner's lien in terms to connect the lien claimant with the owner of the mine in a contract relation, but it is sufficient to follow the words of the State. In an action to enforce a miner's lien the statute does not dispense with the necessity of establishing a contract relation between the lien claimant and the owner of the mine as a matter of pleading and proof.

Stuart v. Camp Carson Mining & Power Co. (Oregon), 165 Pacific 354, p. 361.

SUFFICIENCY OF RECORD.

The statute of Oregon (L. O. L., sec. 7446) provides that the county clerk shall record such claims in a book kept for such purpose, which shall be indexed as deeds and other conveyances. It is a sufficient compliance with this law where a miner's lien is recorded in a book kept in the office of the county clerk for that purpose and in which miners' liens were recorded, although in the same volume mechanics' liens were likewise recorded, and where a direct and indirect index was made citing the page whereon each claim was inscribed.

Stuart v. Camp Carson Mining & Power Co. (Oregon), 165 Pacific 354, p. 361.

KNOWLEDGE OF OWNERSHIP OF PROPERTY.

A miner desiring to hold and enforce a lien for labor on mining property can be charged only with the knowledge of the ownership of the property as it appears upon the public record. A person who stands by and permits others who claim to be the owners of the mine, and who are rightfully in possession of a working mine, can not claim, as against miners holding and asserting liens for labor performed in the development of the mine, that he owns and has an interest in the mine.

Bishop v. Henry (Washington), 165 Pacific 237, p. 240.

OWNERSHIP OF TOOLS.

The law does not require miners in order to protect their rights and maintain their liens to inquire into the ownership of the tools and appliances used by them in their mining operations, and in enforcing their liens it is not necessary for them to prove that the work was done in reliance upon the ownership of such appliances. It is enough where they knew by whom they were employed, what they were to do, and what was being furnished them to do it with, and that the operators furnished them with the tools and appliances.

Rogers v. Reynolds (Washington), 164 Pacific 80, p. 81.

MINE ON PUBLIC LANDS—OWNERSHIP.

The statute of Oregon giving miners a right to liens on mining property and providing that liens may be enforced where the name of the owner is unknown, is intended to apply to mining claims made upon public lands where the title in fee is in the United States Government and where the claimant has nothing more than a possessory right to the claim.

Bishop v. Henry (Washington), 165 Pacific 237, p. 240.

OPERATION OF MINE BY JOINT OWNER—LIABILITY OF NONCONSENTING OWNER.

The interest of a joint owner in a mine is not subject to the liens of miners employed by the other joint owner who is operating the mine without the consent or acquiescence of such joint owner, and the nonoperating and nonconsenting joint owner is not required to give the notice of nonliability provided for by the Oregon statute.

Bishop v. Henry (Washington), 165 Pacific 237, p. 239.

OWNER MUST GIVE NOTICE TO AVOID LIABILITY.

A part or a joint owner of a mining claim who consents to the working of the claim by the other joint owner subjects his interest in the mine to the liens of miners who perform labor and furnish material in the operation of the mine, unless he posts the notice of nonliability and has the same recorded as required by the Oregon statute (sec. 7444). The failure of an owner or part owner to post and record the notice required is by the statute made conclusive proof of the consent of such owner that his interest in the mine shall be subject to the miners' liens. A part owner of a mine who consents to the working of it by the other joint owner is in the same position relating to miners' liens as if he had leased the property to such joint owner.

Bishop v. Henry (Oregon), 165 Pacific 237, p. 239.

LIEN ON LEASED MINE—FAILURE TO RECORD LEASE.

The act of the Legislature of Alaska of April 30, 1913 (Sess. Laws 1913, p. 308), gives miners' liens upon a mine or mining claim for labor done in operating the mine and requires the recording of a lease of the mine or mining claim, or the posting of a notice stating the name of the lessee or persons other than the owner and operator of a mine, and stating that the owner will not be responsible for work done under the lease. The failure of the owner or lessor to record his lease or to post the required notice makes his mine or mining claim subject to the liens of laborers employed by and working for a lessee of the mine while the act was in force.

Spaulding v. Martin, 241 Fed. 372, p. 375.

PRIORITY BETWEEN SELLER AND LANDLORD.

The seller of mining machinery under a conditional sale reserving title until full payment of the purchase price, who has the notice of such reservation duly recorded as required by the governing statute, has a lien superior to that of the landlord of the purchaser under a lease giving the lessor a right to a mortgage on all the property placed on the leased property.

Mound Coal Co. v. Jeffrey Mfg. Co., 240 Fed. 412.

VALIDITY OF ALASKAN STATUTE.

Section 8 of the act of Congress of August 24, 1912 (37 Stat. 512), providing for the Legislature of the Territory of Alaska, provides among other things that no law shall embrace more than one subject which shall be expressed in its title. The act of the Legislature of Alaska passed April 30, 1913 (Sess. Laws 1913, p. 308), giving a lien on a mine in favor of miners is not invalid because it contains many subjects. The subject undertaken to be provided for is liens on mines in favor of laborers and material men and the designation by the legislature as to whom should be considered such laborers and what property should be considered appurtenant to mines and subject to the liens provided for and how such liens should be secured are not independent subjects but are clearly embraced in the subject of the act.

Spaulding v. Martin, 241 Fed. 372, p. 376.

REPEAL OF ALASKAN LIEN LAW.

The act of the Legislature of Alaska of April 30, 1913 (Sess. Laws 1913, p. 308), providing for liens on mines in favor of laborers and material men, was expressly repealed by the act of the legislature approved April 21, 1915 (Sess. Laws 1915, p. 29).

Spaulding v. Martin, 241 Fed. 372, p. 375.

FORECLOSURE—RIGHTS OF LIEN CLAIMANTS NOT PARTIES.

A decree foreclosing miners' liens on mining property does not determine the rights of lien claimants which were created before the bringing of the suit and were not foreclosed by the decree.

Bishop v. Henry (Oregon), 165 Pacific 237, p. 239.

FORECLOSURE—AMENDMENT OF PLEADING.

In an action to enforce a lien the court may, after the submission of the case, permit the complainants to amend their petition by attaching and filing a copy of the notice of the lien, where it does not appear that the evidence required to support the complaint after amendment was any different from that offered before the amendment.

Stuart v. Camp Carson Mining & Power Co. (Oregon), 165 Pacific 354, p. 361.

QUARRY OPERATIONS.

DEFECTIVE APPLIANCES—DUTY TO WARN.

A quarry operator having knowledge that a particular place in which an employee is put to work is not reasonably safe because of a liability of cars for hoisting rock to a crusher to become detached from the cable and descend without warning at a rapid rate over the place where the employee was working, may be guilty of negligence in failing to warn the employee of the danger. The duty to warn an employee under such circumstances does not depend on the experience or inexperience of the employee, and the employee's right to recover could not be made to depend upon the operator's knowledge of the employee's inexperience.

Goodin, Brown & Co. v. Skaggs (Kentucky), 195 Southwestern 427, p. 428.

FAILURE TO WARN OR INSTRUCT—NEGLIGENCE.

The failure of a quarry operator to warn an employee of dangers, arising either in the course of the employment or from defective appliances that are known to the employer and unknown to the employee, may constitute such negligence as will render the operator liable for injuries sustained by the employee.

Goodin, Brown & Co. v. Skaggs (Kentucky), 195 Southwestern 427, p. 428.

EXPERT EVIDENCE—FACTS AND CONCLUSIONS.

In an action by an employee in a quarry for damages for injuries sustained by reason of defective appliances, it is proper for a witness who was qualified and experienced in the operation of such appliances to testify as an expert, and as such, to state that the appliance in question was not reasonably safe. Such a statement is not a conclusion as distinguished between the opinion of the witness where he did not attempt to state the cause of the accident, but such a statement is a deduction from the facts known to the witness and it is immaterial whether the answer of an expert be called a conclusion or an opinion.

Goodin, Brown & Co. v. Skaggs (Kentucky), 195 Southwestern 427, p. 428.

DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGES.

PERMANENT INJURY—OPINION OF INJURED PERSON.

In an action by a miner to recover damages for injuries wholly internal and showing no visible evidence of permanency the plaintiff himself is not competent to give his opinion that the injury is permanent, but proof of the permanency of such injury can be made by an expert only.

Ward v. Liverpool Salt & Coal Co. (West Virginia), 92 Southeastern 92, p. 96.

DAMAGES NOT EXCESSIVE.

INSTANCES.

A verdict for \$8,000 was not regarded as excessive where an able-bodied miner had three fingers on his right hand so badly crushed, broken, and lacerated that they had to be amputated and where the amputation performed by the surgeon of the mining company was such that the nerves were exposed and that a second amputation would be necessary in order to prevent constant pain.

Superior & Pittsburgh Copper Co. v. Tomaich (Arizona), 165 Pacific 1101, p. 1104.

In an action by a miner for damages for injuries where the proof shows that the injury was what was known as a "green break" of one of the bones of the leg, which means that the bone was bent and cracked on one side, that the suffering was not long continuing, the doctor's bill was \$15, the time missed was three months and the wages \$2.84 a day, a verdict of \$750 is not such as to indicate that the jury acted from prejudice, partiality, or corruptness and can not as a matter of law be said to be excessive.

Otter Creek Coal Co. v. Archer (Indiana App.), 115 Northeastern 952, p. 953.

WATER RIGHTS.

ABANDONMENT.

Section 9 of the Oregon statute of October 4, 1898 (Oregon Laws, 1898, p. 16), was impliedly amended in respect to the period of limitations for the abandonment of water rights by section 30 of the act approved February 18, 1899 (Oregon Laws, 1899, p. 172). This latter act provides among other things that if the owner of a ditch, canal, flume, or pipe line used for the purpose of developing mineral resources of the State shall fail or neglect to use the same for a period of two years at any time it shall be deemed an abandonment; and such right may be extinguished by an act showing an intention to surrender or abandon the right, after which, if the person having the right ceases to use it for the statutory period for abandonment, his interest is lost.

Camp Carson Mining & Power Co. v. Stephenson (Oregon), 165 Pacific 351, p. 354.

ABANDONMENT—QUESTION OF FACT.

Under the statute of Oregon (Oregon Laws, 1899, p. 172), providing that a failure or neglect to use a ditch, flume, or pipe line held for the development of the mineral resources of the State for a period of two years shall be deemed an abandonment. The question of abandonment is by the statute made a question of fact to be tried and determined as any other question of fact, and the statute in this respect creates only a disputable presumption, and on proof of an abandonment for more than two years without extension or excuse establishes the abandonment.

Camp Carson Mining & Power Co. v. Stephenson (Oregon), 165 Pacific 351, p. 354.

INTERSTATE COMMERCE.

SALE OF NATURAL GAS BY RECEIVER.

The sale of natural gas to consumers in a particular locality is not national in its nature, admits of no uniform system of regulation, and is not the kind of interstate commerce which requires exclusive legislation by Congress and is therefore subject to State control where Congress has not acted. A receiver of a natural-gas company is not engaged in interstate commerce when selling natural gas to the consumers in a particular locality, although the gas is piped from another State.

State v. Landon (Kansas), 165 Pacific 1111, p. 1112.

PUBLICATIONS RELATING TO MINING LAWS.

A limited supply of the following publications of the Bureau of Mines has been printed and is available for free distribution until the edition is exhausted. Requests for all publications can not be granted, and to insure equitable distribution applicants are requested to limit their selection to publications that may be of especial interest to them. Requests for publications should be addressed to the Director, Bureau of Mines.

The Bureau of Mines issues a list showing all its publications available for free distribution as well as those obtainable only from the Superintendent of Documents, Government Printing Office, on payment of the price of printing. Interested persons should apply to the Director, Bureau of Mines, for a copy of the latest list.

PUBLICATIONS AVAILABLE FOR FREE DISTRIBUTION.

BULLETIN 75. Rules and regulations for metal mines, by W. R. Ingalls and others. 1915. 296 pp., 1 fig.

BULLETIN 90. Abstracts of current decisions on mines and mining, December, 1913, to September, 1914, by J. W. Thompson. 1915. 176 pp.

BULLETIN 101. Abstracts of current decisions on mines and mining, October, 1914, to April, 1915, by J. W. Thompson. 1915. 138 pp.

BULLETIN 113. Abstracts of current decisions on mines and mining, reported from May to September, 1915, by J. W. Thompson. 1916. 124 pp.

BULLETIN 118. Abstracts of current decisions on mines and mining, reported from October to December, 1915, by J. W. Thompson. 1916. 74 pp.

BULLETIN 126. Abstracts of current decisions on mines and mining, reported from January to April, 1916, by J. W. Thompson. 1916. 90 pp.

BULLETIN 143. Abstracts of current decisions on mines and mining, reported from May to August, 1916, by J. W. Thompson. 1916. 72 pp.

TECHNICAL PAPER 138. Suggested safety rules for installing and using electrical equipment in bituminous coal mines, by H. H. Clark and C. M. Means. 1916. 36 pp.

BULLETIN 147. Abstracts of current decisions on mines and mining, reported from September to December, 1916, by J. W. Thompson. 1917. 84 pp.

BULLETIN 152. Abstracts of current decisions on mines and mining, reported from January to April, 1917, by J. W. Thompson. 1917. 78 pp.

PUBLICATIONS THAT MAY BE OBTAINED ONLY THROUGH THE SUPERINTENDENT OF DOCUMENTS.

BULLETIN 61. Abstracts of current decisions on mines and mining, October, 1912, to March, 1913, by J. W. Thompson. 1913. 32 pp. 10 cents.

BULLETIN 65. Oil and gas wells through workable coal beds; papers and discussions, by G. S. Rice, O. P. Hood, and others. 1913. 101 pp., 1 pl., 11 figs. 10 cents.

BULLETIN 79. Abstracts of current decisions on mines and mining, March to December, 1913, by J. W. Thompson. 1914. 140 pp. 20 cents.

BULLETIN 94. United States mining statutes annotated, by J. W. Thompson. 1915. 1772 pp. In two parts, not sold separately. Cloth, \$2.50 per set; paper, \$2.00.

TECHNICAL PAPER 53. Proposed regulations for the drilling of oil and gas wells, with comments thereon, by O. P. Hood and A. G. Heggem. 1913. 28 pp., 2 figs. 5 cents.



